SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 48

CARL STILL, PETITIONER,

vs.

NORFOLK & WESTERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

PETITION FOR CERTIORARI FILED FEBRUARY 16, 1961
CERTIORARI GRANTED APRIL 17, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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CARL STILL, PETITIONER,

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NORFOLK & WESTERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

CARL STILL, Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Defendant

TRESPASS ON THE CASE

DECLARATION--Filed May 14, 1959

Carl Still, Plaintiff, complains of Norfolk & Western Railway Company, a Corporation, of a plea of Trespass on the Case, for this, to-wit:

That on and prior to January 23, 1958, the said defendant, Norfolk & Western Railway Company, a Corporation, hereinafter called the defendant, was, and still is, a common carrier by railroad of freight, coal, merchandise and passengers, and was on the day and year aforesaid, and for a long time prior thereto had been, and still is the owner and operator of a certain interstate railroad system running from the City of Norfolk, in the State of Virginia, into and through the State of West Virginia to Columbus [fol. 3] and Cincinnati, in the State of Ohio, and into the State of North Carolina, and elsewhere; that the said system of interstate railroad consists of main lines, trunk lines, branch lines, passing lines and yards.

That on the day and year aforesaid, and for a long time prior thereto, the said defendant, as a part of its interstate railroad system, operated in and adjacent to the City of Bluefield, Mercer County, West Virginia, a large railroad yard, consisting of many tracks, sidetracks, main line tracks and spurs, which was used for the purpose of storing railroad cars and railroad gondolas, and where it did various and sundry switching operations with engines in making up trains to go east and west on its said interstate

railroad system, and in conjunction therewith it used many yard brakemen, conductors, engineers and switching crews.

That on the day and year aforesaid, and for a long time prior thereto, the plaintiff was employed by the defendant as a yard brakeman in the defendant's Bluefield yards, and it was the duty of the plaintiff as a yard brakeman, among other things, to climb upon railroad cars and gondolas when they were in motion and to operate the brakes thereon while they were in motion and to ride upon said railroad cars and gondolas in switching operations from one track to another track in the process of placing said cars on different tracks so that trains could be made up [fol. 4] leaving the Bluefield yards going east and west on said interstate railroad system; that on the day and year aforesaid the plaintiff was engaged in a switching operation of certain railroad cars and railroad gondolas, and at the direction of his conductor; that on the day and year aforesaid a steam-engine operated by an engineer and fireman had been attached to many coal cars and gondolas and had pulled a string of railroad cars and gondolas out into and upon one of the main line tracks in the said railroad yards at Bluefield for the purpose of separating and switching the said railroad cars and gondolas onto several different tracks or spurs; that the plaintiff was directed and ordered by the conductor to get upon one of said railroad cars and gondolas which had been detached from the main string of cars attached to the steam engine, and to place said railroad car and gondola upon another track or spur in order to separate the said railroad car and gondola from the other cars attached to the said train; that after detaching said railroad car and gondola which the plaintiff was operating and braking and riding upon, and due to the elevation of the track, the said car would run and operate on a downgrade to the track or spur upon which it was to be placed, and the plaintiff was to control the motion and operation of the said car by the brake upon the same, and it was necessary for the plaintiff to be on top of the said car where he could operate the brake and slow down or stop the said car when it became necessary so to do; that the plaintiff did, at the instance of the conductor, get upon said railroad car and gondola after it had been detached and cut loose from the main string of cars attached to the

[fol. 5] engine, and while the plaintiff was riding the said railroad car and gondola, as aforesaid, and while the plaintiff was on top of said car in a place where he should be in order to control the movements of the said car by the brakes, the defendant's engineer and other servants, agents and employees carelessly and negligently started the engine and string of cars attached thereto in a backward movement, and contrary to a red signal light and contrary to the rules and regulations then in force and promulgated by said defendant, and violently and carelessly and negligently, and without warning to the plaintiff, Carl Still, ran into and struck the railroad car and gondola upon which the plaintiff was riding as a brakeman, causing said railroad car to violently collide with another railroad car and gondola preceding the one the plaintiff was upon, with such force that the plaintiff was violently thrown and knocked off of the railroad car and gondola, upon which he was riding as a brakeman, causing the plaintiff to fall many feet and to strike his body, and particularly his back, in such a manner that it was permanently injured and broken, as hereafter described.

Plaintiff further avers that at the time of his injuries he was then engaged and was an employee in the furtherance of interstate commerce for the defendant and that he came under and was under the provisions of an act of Congress, and known as the Federal Employers' Liability Act as amended August 11, 1939, and as specifically set out [fol. 6] in 45 U. S. C. A., Sections 51-58, inclusive, and that this action on his behalf is brought under and pursuant to the said Federal Employers' Liability Act.

That it then and there became and was the duty of the defendant, through its servants, agents, employees, trainmen, engineer and conductor, to observe and to abide by all of the following specific duties toward this plaintiff, to-wit:

(1) To provide the plaintiff with a safe place to work;

(2) To furnish the plaintiff competent and experienced associates, fellow-servants and co-employees, including the engineer operating the steam yard engine attached to the string of railroad cars and gondolas then engaged in the switching operation of the said railroad cars and gondolas;

(3) To refrain from starting said steam engine and string

of cars and from moving the said steam engine and railroad cars and gondolas attached thereto in the face of a red signal light, and in violation of the rules and regulations promulgated by the defendant, in a backward movement until the railroad car and gondola on which the plaintiff was braking had reached a place of safety; and

(4) To refrain from carelessly and negligently running said engine and string of railroad cars and gondolas attached thereto into and against the railroad car and gondola upon which the plaintiff was riding and operating as a yard brakeman.

[fol. 7] Plaintiff further avers that the defendant, notwithstanding its said several duties owed to the plaintiff, and as alleged in the next preceding paragraphs of this Declaration, by and through its officers, servants, agents, employees and engineer, was guilty of the following specific unlawful, careless and negligent acts at the time of the injuries hereinafter complained of to the plaintiff, to-wit:

(1) Failed to provide the plaintiff with a safe place to work;

(2) Failed to furnish the plaintiff competent and experienced associates, fellow-servants and co-employees, including the engineer operating the steam yard engine attached to the string of railroad cars and gondolas which was then engaged in the switching operation of said railroad cars and gondolas;

(3) Negligently and carelessly, and in the face of warning and in the face of a red signal light against said movement, and in violation of the rules and regulations of the defendant, started said steam engine, with a string of cars and gondolas attached thereto, in a backward movement, before the plaintiff's railroad car had reached its destination and a place of safety; and

(4) Did carelessly and negligently start said steam engine and string of cars attached thereto and back the same and run the same into and against the railroad car and gondola upon which the plaintiff was riding as a yard brakeman.

[fol. 8] That by reason of all of the defendant's negligence, as alleged in the next preceding paragraphs of this Declaration, the plaintiff was thrown from the car and knocked off of the car upon which he was riding and con-

trolling as a yard brakeman and fell a great distance and was violently thrown from said car, and the plaintiff was severely and permanently injured for life; that as a result of said accident the plaintiff sustained a very severe and permanent injury to the ligaments, muscles and tendons of his back; that as a result of the said accident the plaintiff sustained a severe and permanent injury to his spinal column and to the nerves in his body, causing him to be numb and partially paralyzed from his waist down his body and both limbs until it is very difficult for him to walk or get about in any manner; that as a result of said accident several vertebrae in the plaintiff's back were broken, crushed and dislocated; that as a result of said accident several discs between the vertebrae in the plaintiff's back were permanently crushed, broken, injured and dislocated; that the plaintiff has a severe permanent injury and weakness in his back and in both of his legs; and the plaintiff has suffered in the past and now suffers and will in the future and during the remainder of his natural life suffer great physical pain, physical discomfort and mental anguish, for which he claims the right to be indemnified in this cause of action; that since said accident the plaintiff has been unable to carry on or pursue and will in the future be permanently disabled from carrying on or pursuing his duties as a yard brakeman for the N & W Railway Com-[fol. 9] pany or from performing any manual labor, and he here and now claims the right to be indemnified in this cause of action for all past loss of earnings and future loss of earnings during the remainder of his natural life; that the plaintiff at the time he was injured was working five days a week and earning Twenty-one Dollars and Thirty-nine Cents ($21.39) per day, and that he has lost in earning capacity since the time he was injured, up until the time of the filing of this Declaration, the sum of approximately Seven Thousand Two Hundred Seventy-two Dollars and Sixty Cents ($7,272.60); that the plaintiff will continue to lose in earning capacity during the remainder of his natural life the sum of at least five to six thousand dollars per year by reason of his said injuries, for which he claims the right to be indemnified in this cause of action; that by reason of the plaintiff's injuries it was necessary for him to be confined in hospitals in Bluefield, West Vir-

ginia, and Roanoke, Virginia, and it will be necessary in the future and during the remainder of the plaintiff's natural life to undergo medical care and treatment to alleviate the pain and suffering as a result of his injuries, and he will necessarily have to pay out and expend in the future and during the remainder of his natural life large sums of money for doctors' and hospital bills, for which he claims the right to be indemnified in this cause of action; and it will be necessary for the plaintiff to undergo serious operations and surgery in order to alleviate the pain and suffering in his back.

[fol. 10] Plaintiff avers that he has been permanently injured and permanently and totally disabled from ever carrying on or performing his duties and occupation as a yard brakeman and that he had been permanently and totally disabled from carrying on or pursuing any gainful occupation involving manual labor, and he will in this action claim damages for loss of earnings, past and future, pain and suffering and hospital and medical bills which will necessarily have to be incurred during the remainder of his natural life.

Wherefore, and by means of all of the careless and negligent acts charged heretofore against the defendant in this Declaration, the plaintiff avers that he has been damaged to the amount of Five Hundred Thousand ($500,000.00) Dollars, and, therefore, he brings this suit.

Carl Still, By Counsel.

Burton, Griffith, Burton and Burkett, Walter W. Burton, Attorneys for the Plaintiff.

5/14/59—Copy mailed to Sanders & Sanders, Bluefield, W. Va.

[fols. 11-68] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

[Title omitted]

Case No. 5734

AMENDED DECLARATION—Filed July 10, 1959

First Count

Carl Still, Plaintiff, complains of Norfolk & Western Railway Company, a Corporation, of a plea of Trespass on the Case, for this, to-wit:

That on and prior to January 23, 1958, the said defendant, Norfolk & Western Railway Company, a Corporation, hereinafter called the defendant, was, and still is, a common carrier by railroad of freight, coal, merchandise and passengers, and was on the day and year aforesaid, and for a long time prior thereto had been, and still is the owner and operator of a certain interstate railroad system running from the City of Norfolk, in the State of Virginia, [fol. 69] into and through the State of West Virginia to Columbus and Cincinnati, in the State of Ohio, and into the State of North Carolina, and elsewhere; that the said system of interstate railroad consists of main lines, trunk lines, branch lines, passing lines and yards.

That on the day and year aforesaid, and for a long time prior thereto, the said defendant, as a part of its interstate railroad system, operated in and adjacent to the City of Bluefield, Mercer County, West Virginia, a large railroad yard, consisting of many tracks, sidetracks, main line tracks and spurs, which was used for the purpose of storing railroad cars and railroad gondolas, and where it did various and sundry switching operations with engines in making up trains to go east and west on its said interstate railroad system, and in conjunction therewith it used many yard brakemen, conductors, engineers and switching crews.

That on the day and year aforesaid, and for a long time prior thereto, the plaintiff was employed by the defendant as a yard brakeman in the defendant's Bluefield yards, and it was the duty of the plaintiff as a yard brakeman, among

other things, to climb upon railroad cars and gondolas when they were in motion and to operate the brakes thereon while they were in motion and to ride upon said railroad cars and gondolas in switching operations from one track to another track in the process of placing said cars on [fol. 70] different tracks so that trains could be made up leaving the Bluefield yards going east and west on said interstate railroad system; that on the day and year aforesaid the plaintiff was engaged in a switching operation of certain railroad cars and railroad gondolas, and at the direction of his conductor; that on the day and year aforesaid a steam engine operated by an engineer and fireman had been attached to many coal cars and gondolas and had pulled a string of railroad cars and gondolas out into and upon one of the main line tracks in the said railroad yards at Bluefield for the purpose of separating and switching the said railroad cars and gondolas onto several different tracks or spurs; that the plaintiff was directed and ordered by the conductor to get upon one of said railroad cars and gondolas which had been detached from the main string of cars attached to the steam engine, and to place said railroad car and gondola upon another track or spur in order to separate the said railroad car and gondola from the other cars attached to the said train; that after detaching said railroad car and gondola which the plaintiff was operating and braking and riding upon, and due to the elevation of the track, the said car would run and operate on a downgrade to the track or spur upon which it was to be placed, and the plaintiff was to control the motion and operation of the said car by the brake upon the same, and it was necessary for the plaintiff to be on top of the said car where he could operate the brake and slow down or stop the said car when it became necessary so to do; that [fol. 71] the plaintiff did, at the instance of the conductor, get upon said railroad car and gondola after it had been detached and cut loose from the main string of cars attached to the engine, and while the plaintiff was riding the said railroad car and gondola, as aforesaid, and while the plaintiff was on top of said car in a place where he should be in order to control the movements of the said car by the brakes, the defendant's engineer and conductor and other servants, agents and employees carelessly and negligently

started the engine and string of cars attached thereto in a backward movement, and contrary to a red signal light and contrary to the rules and regulations then in force and promulgated by said defendant, and violently and carelessly and negligently, and without warning to the plaintiff, Carl Still, ran into and struck the railroad car and gondola upon which the plaintiff was riding as a brakeman, with such force that the plaintiff's body was violently thrown and knocked off of the railroad car and gondola, upon which he was riding as a brakeman, causing the plaintiff to fall many feet and to strike his body, and particularly his back, in such a manner that it was permanently injured and broken, as hereafter described.

Plaintiff further avers that at the time of his injuries he was then engaged and was an employee in the furtherance of interstate commerce for the defendant and that he came under and was under the provisions of an act of [fol. 72] Congress, and known as the Federal Employers' Liability Act as amended August 11, 1939, and as specifically set out in 45 U. S. C. A., Sections 51-58, inclusive, and that this action on his behalf is brought under and pursuant to the said Federal Employers' Liability Act.

That it then and there became and was the duty of the defendant, through its servants, agents, employees, trainmen, engineer and conductor, to observe and to abide by all of the following specific duties toward this plaintiff, to-wit:

(1) To provide the plaintiff with a safe place to work;

(2) To furnish the plaintiff competent and experienced associates, fellow-servants and co-employees, including the conductor and engineer operating the steam yard engine attached to the string of railroad cars and gondolas then engaged in the switching operation of the said railroad cars and gondolas;

(3) To refrain from starting said steam engine and string of cars and from moving the said steam engine and railroad cars and gondolas attached thereto in the face of a red signal light, and in violation of the rules and regulations promulgated by the defendant, in a backward movement until the railroad car and gondola on which the plaintiff was braking had reached a place of safety; and

(4) To refrain from carelessly and negligently running

said engine and string of railroad cars and gondolas at-
[fol. 73] tached thereto into and against the railroad car and gondola upon which the plaintiff was riding and operating as a yard brakeman.

Plaintiff further avers that the defendant, notwithstanding its said several duties owed to the plaintiff, and as alleged in the next preceding paragraphs of this Amended Declaration, by and through its officers, servants, agents, employees and engineer and conductor, was guilty of the *following specific unlawful, careless and negligent acts at* the time of the injuries hereinafter complained of to the plaintiff, to-wit:

(1) Failed to provide the plaintiff with a safe place to work;

(2) Failed to furnish the plaintiff competent and experienced associates, fellow-servants and co-employees, including the engineer and conductor operating the steam yard engine attached to the string of railroad cars and gondolas which was then engaged in the switching operation of said railroad cars and gondolas;

(3) Negligently and carelessly, and in the face of warning and in the face of a red signal light against said movement, and in violation of the rules and regulations of the defendant, started said steam engine, with a string of cars and gondolas attached thereto, in a backward movement, before the plaintiff's railroad car had reached its destination and a place of safety; and

[fol. 74] (4) Did carelessly and negligently start said steam engine and string of cars attached thereto and back the same and run the same into and against the railroad car and gondola upon which the plaintiff was riding as a yard brakeman.

That by reason of all of the defendant's negligence, as alleged in the next preceding paragraphs of this Amended Declaration, the plaintiff was thrown against the car and knocked off of the car upon which he was riding and controlling as a yard brakeman, and the plaintiff was severely and permanently injured for life; that as a result of said accident the plaintiff sustained a very severe and permanent injury to the ligaments, muscles and tendons of his back; that as a result of the said accident the plaintiff sustained a severe and permanent injury to his spinal column

and to the nerves in his body, causing him to be numb and partially paralyzed from his waist down his body and both limbs until it is very difficult for him to walk or get about in any manner; that as a result of said accident several vertebrae in the plaintiff's back were broken, crushed and dislocated; that as a result of said accident several discs between the vertebrae in the plaintiff's back were permanently crushed, broken, injured and dislocated; that the plaintiff has a severe permanent injury and weakness in his back and in both of his legs; the plaintiff walks with a definite left flexed hip limp; all the motions in his spine are very sharply limited by pain; there is root pain down the leg with increased numbness of the left leg on jugular compression; he does not have the full use of the right or [fol. 75] left leg; there is paraesthesia of the left leg; the lumbar spine was displaced forward on the sacrum; the lumbar muscles are held in constant spasms and L-2, L-3, L-4 and L-5 spinous processes were crushed, broken and damaged; there is complete limitation of motion in the lumbar spine with increased muscle spasms at the lumbosacral juncture; the fifth intervertebral disc space is obliterated; the discs in the plaintiff's lower back and spine were crushed and damaged; the plaintiff sustained a permanent and severe spondylolisthesis due to the dislocation of his spine from the sacrum; and the plaintiff has suffered in the past and now suffers and will in the future and during the remainder of his natural life suffer great physical pain, physical discomfort and mental anguish, for which he claims the right to be indemnified in this cause of action; that since said accident the plaintiff has been unable to carry on or pursue and will in the future be permanently disabled from carrying on or pursuing his duties as a yard brakeman for the N & W Railway Company or from performing any manual labor, and he here and now claims the right to be indemnified in this cause of action for all past loss of earnings and future loss of earnings during the remainder of his natural life; that the plaintiff at the time he was injured was working five days a week and earning Twenty-one Dollars and Thirty-nine Cents ($21.39) per day, and that he has lost in earning capacity since the time he was injured, up until the time of the filing of this Amended Declaration, the sum of approximately Eight

Thousand Two Hundred Seventy-two Dollars and Sixty [fol. 76] Cents ($8,272.60); that the plaintiff will continue to lose in earning capacity during the remainder of his natural life the sum of at least five to six thousand dollars per year by reason of his said injuries, for which he claims the right to be indemnified in this cause of action; that by reason of the plaintiff's injuries it was necessary for him to be confined in hospitals in Bluefield, West Virginia, and Roanoke, Virginia, and it will be necessary in the future and during the remainder of the plaintiff's natural life to undergo medical care and treatment to alleviate the pain and suffering as a result of his injuries, and he will necessarily have to pay out and expend in the future and during the remainder of his natural life large sums of money for doctors' and hospital bills, for which he claims the right to be indemnified in this cause of action; and it will be necessary for the plaintiff to undergo serious operations and surgery in order to alleviate the pain and suffering in his back.

Plaintiff avers that he has been permanently injured and permanently and totally disabled from ever carrying on or performing his duties and occupation as a yard brakeman and that he has been permanently and totally disabled from carrying on or pursuing any gainful occupation involving manual labor, and he will in this action claim damages for loss of earnings, past and future, pain and suffering and hospital and medical bills which will necessarily have to be incurred during the remainder of his natural life.

[fol. 77] Second Count

That on and prior to January 23, 1958, the said defend-
And for this also, to-wit:

ant, Norfolk & Western Railway Company, a Corporation, hereinafter called the defendant, was, and still is, a common carrier by railroad of freight, coal, merchandise and passengers, and was on the day and year aforesaid, and for a long time prior thereto had been, and still is the owner and operator of a certain interstate railroad system running from the City of Norfolk, in the State of Virginia, into and through the State of West Virginia to Columbus

and Cincinnati, in the State of Ohio, and into the State of North Carolina, and elsewhere; that the said system of interstate railroad consists of main lines, trunk lines, branch lines, passing lines and yards.

That on the day and year aforesaid, and for a long time prior thereto, the said defendant, as a part of its interstate railroad system, operated in and adjacent to the City of Bluefield, Mercer County, West Virginia, a large railroad yard, consisting of many tracks, sidetracks, main line tracks and spurs, which was used for the purpose of storing railroad cars and railroad gondolas, and where it did various and sundry switching operations with engines in making up trains to go east and west on its said interstate railroad system, and in conjunction therewith it used many yard brakemen, conductors, engineers and switching crews. [fol. 78] That on the day and year aforesaid, and for a long time prior thereto, the plaintiff was employed by the defendant as a yard brakeman in the defendant's Bluefield yards, and it was the duty of the plaintiff as a yard brakeman, among other things, to climb upon railroad cars and gondolas when they were in motion and to operate the brakes thereon while they were in motion and to ride upon said railroad cars and gondolas in switching operations from one track to another track in the process of placing said cars on different tracks so that trains could be made up leaving the Bluefield yards going east and west on said interstate railroad system; that on the day and year aforesaid the plaintiff was engaged in a switching operation of certain railroad cars and railroad gondolas, and at the direction of his conductor; that on the day and year aforesaid a steam engine operated by an engineer and fireman had been attached to many coal cars and gondolas and had pulled a string of railroad cars and gondolas out into and upon one of the main line tracks in the said railroad yards at Bluefield for the purpose of separating and switching the said railroad cars and gondolas onto several different tracks or spurs; that the plaintiff was directed and ordered by the conductor to get upon one of said railroad cars and gondolas which had been detached from the main string of cars attached to the steam engine, and to place said railroad car and gondola upon another track or spur in order to separate the said railroad car and gondola from the other

[fol. 79] cars attached to the said train; that after detaching said railroad car and gondola which the plaintiff was operating and braking and riding upon, and due to the elevation of the track, the said car would run and operate on a downgrade to the track or spur upon which it was to be placed, and the plaintiff was to control the motion and operation of the said car by the brake upon the same, and it was necessary for the plaintiff to be on top of the said car where he could operate the brake and slow down or stop the said car when it became necessary so to do; that the plaintiff did, at the instance of the conductor, get upon said railroad car and gondola after it had been detached and cut loose from the main string of cars attached to the engine, and while the plaintiff was riding the said railroad car and gondola, as aforesaid, and while the plaintiff was on top of said car in a place where he should be in order to control the movements of the said car by the brakes, the defendant's engineer and conductor and other servants, agents and employees carelessly and negligently started the engine and string of cars attached thereto in a backward movement, and contrary to a red signal light and contrary to the rules and regulations then in force and promulgated by said defendant, and violently and carelessly and negligently, and without warning to the plaintiff, Carl Still, ran into and struck the railroad car and gondola upon which the plaintiff was riding as a brakeman, with such force that the plaintiff's body was violently thrown against and into the railroad car and gondola upon which he was riding, violently striking [fol. 80] his hip and lower back against the railroad car and gondola in such a manner and in such a way that his lower back, his legs, and the lower part of the plaintiff's body was permanently injured and broken, as hereinafter detailed.

Plaintiff further avers that at the time of his injuries he was then engaged and was an employee in the furtherance of interstate commerce for the defendant and that he came under and was under the provisions of an act of Congress, and known as the Federal Employers' Liability Act as amended August 11, 1939, and as specifically set out in 45 U. S. C. A., Sections 51-58, inclusive, and that this action on his behalf is brought under and pursuant to the said Federal Employers' Liability Act.

That it then and there became and was the duty of the

defendant, through its servants, agents, employees, trainmen, engineer and conductor, to observe and to abide by all of the following specific duties toward this plaintiff, to-wit:

(1) To provide the plaintiff with a safe place to work;

(2) To furnish the plaintiff competent and experienced associates, fellow-servants and co-employees, including the conductor and engineer operating the steam yard engine attached to the string of railroad cars and gondolas then engaged in the switching operation of the said railroad cars and gondolas;

(3) To refrain from starting said steam engine and string of cars and from moving the said steam engine and railroad [fol. 81] cars and gondolas attached thereto in the face of a red signal light, and in violation of the rules and regulations promulgated by the defendant, in a backward movement until the railroad car and gondola on which the plaintiff was braking had reached a place of safety; and

(4) To refrain from carelessly and negligently running said engine and string of railroad cars and gondolas attached thereto into and against the railroad car and gondola upon which the plaintiff was riding and operating as a yard brakeman.

Plaintiff further avers that the defendant, notwithstanding its said several duties owed to the plaintiff, and as alleged in the next preceding paragraphs of this Amended Declaration, by and through its officers, servants, agents, employees and engineer and conductor, was guilty of the following specific unlawful, careless and negligent acts at the time of the injuries hereinafter complained of to the plaintiff, to-wit:

(1) Failed to provide the plaintiff with a safe place to work;

(2) Failed to furnish the plaintiff competent and experienced associates, fellow-servants and co-employees, including the engineer and conductor operating the steam yard engine attached to the string of railroad cars and gondolas which was then engaged in the switching operation of said railroad cars and gondolas;

[fol. 82] (3) Negligently and carelessly, and in the face of warning and in the face of a red signal light against said movement, and in violation of the rules and regulations of

the defendant, started said steam engine, with a string of cars and gondolas attached thereto, in a backward movement, before the plaintiff's railroad car had reached its destination and a place of safety;

(4) Did carelessly and negligently start said steam engine and string of cars attached thereto and back the same and run the same into and against the railroad car and gondola upon which the plaintiff was riding as a yard brakeman; and

(5) Did carelessly and negligently start said steam engine and string of cars attached thereto in a backward movement and move the same back in the direction in which the railroad car and gondola was moving, and upon which Carl Still was riding, and hit said car and gondola upon which Carl Still was riding, causing the same to recouple and then made a sudden stop of the said movement of the said train in a backward motion without notice or warning to the said Carl Still, causing a sudden jerk and a sudden stop of the car upon which Carl Still was riding.

That by reason of the defendant's negligence as alleged in the next preceding paragraph of this Second Count of this Amended Declaration, containing five subheads, all inclusive, but not in limitation of each other, the plaintiff was [fol. 83] violently thrown against the top rib and rim of the car upon which he was riding, and the plaintiff was severely and permanently injured for life; that as a result of said accident the plaintiff sustained a very severe and permanent injury to the ligaments, muscles and tendons of his back; that as a result of the said accident the plaintiff sustained a severe and permanent injury to his spinal column and to the nerves in his body, causing him to be numb and partially paralyzed from his waist down his body and both limbs until it is very difficult for him to walk or get about in any manner; that as a result of said accident several vertebrae in the plaintiff's back were broken, crushed and dislocated; that as a result of said accident several discs between the vertebrae in the plaintiff's back were permanently crushed, broken, injured and dislocated; that the plaintiff has a severe permanent injury and weakness in his back and in both of his legs; the plaintiff walks with a definite left flexed hip limp; all the motions in his spine are very sharply limited by pain; there is root pain down the

leg with increased numbness of the left leg on jugular compression; he does not have the full use of the right or left leg; the lumbar spine was displaced forward on the sacrum; the lumbar muscles are held in constant spasms and L-2, L-3, L-4 and L-5 spinous processes were crushed, broken and damaged; there is complete limitation of motion in the lumbar spine with increased muscle spasms at the lumbosacral juncture; the fifth intervertebral disc space is obliter- [fol. 84] ated; the discs in the plaintiff's lower back and spine were crushed and damaged; the plaintiff sustained a permanent and severe spondylolisthesis due to the dislocation of his spine from the sacrum; there is paraesthesia of the left leg; and the plaintiff has suffered in the past and now suffers and will in the future and during the remainder of his natural life suffer great physical pain, physical discomfort and mental anguish, for which he claims the right to be indemnified in this cause of action; that since said accident the plaintiff has been unable to carry on or pursue and will in the future be permanently disabled from carrying on or pursuing his duties as a yard brakeman for the N & W Railway Company or from performing any manual labor, and he here and now claims the right to be indemnified in this cause of action for all past loss of earnings and future loss of earnings during the remainder of his natural life; that the plaintiff at the time he was injured was working five days a week and earning Twenty-one Dollars and Thirty-nine Cents ($21.39) per day, and that he has lost in earning capacity since the time he was injured, up until the time of the filing of this Amended Declaration, the sum of approximately Eight Thousand Two Hundred Seventy-two Dollars and Sixty Cents ($8,272.60); that the plaintiff will continue to lose in earning capacity during the remainder of his natural life the sum of at least five to six thousand dollars per year by reason of his said injuries, for which he claims the right to be indemnified in this cause of action; that by reason of the plaintiff's injuries it was necessary for him to be confined in hospitals in Bluefield, West Virginia, and Roa- [fol. 85] noke, Virginia, and it will be necessary in the future and during the remainder of the plaintiff's natural life to undergo medical care and treatment to alleviate the pain and suffering as a result of his injuries, and he will necessarily have to pay out and expend in the future and during

the remainder of his natural life large sums of money for doctors' and hospital bills, for which he claims the right to be indemnified in this cause of action; and it will be necessary for the plaintiff to undergo serious operations and surgery in order to alleviate the pain and suffering in his back.

Plaintiff avers that he has been permanently injured and permanently and totally disabled from ever carrying on or performing his duties and occupation as a yard brakeman and that he has been permanently and totally disabled from carrying on or pursuing any gainful occupation involving manual labor, and he will in this action claim damages for loss of earnings, past and future, pain and suffering and hospital and medical bills which will necessarily have to be incurred during the remainder of his natural life.

Wherefore, and by means of all of the unlawful, negligent and careless acts heretofore charged against the defendant in this Amended Declaration, consisting of two counts, the plaintiff avers that he has been damaged to the amount of [fol. 86] Five Hundred Thousand ($500,000.00) Dollars, and, therefore, he brings this suit.

Carl Still, By Counsel.

Burton, Griffith, Burton and Burkett, Walter W. Burton, Attorneys for the Plaintiff.

[fols. 87-94] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

[Title omitted]

STIPULATION—September 3, 1959, Filed September 10, 1959

It is stipulated and agreed by and between counsel representing the plaintiff, Carl Still, and counsel representing the defendant, Norfolk and Western Railway Company, a Corporation, that the plaintiff, Carl Still, while performing his duties as a yard brakeman for the defendant, Norfolk and Western Railway Company, a Corporation, during the

night of January 23, 1958, and immediately prior to and at the time he claims he was injured, was engaged and was an employee in furtherance of interstate commerce and came under the provision of the Act of Congress known as the Federal Employer's Liability Act as amended August 11, 1939, and as set out in 45 U.S.C.A., Sections 51 to 58, inclusive.

It is not, however, admitted by counsel for the defendant that the plaintiff, Carl Still, was injured in the performance of his duties as a yard brakeman for the Norfolk and [fol. 95] Western Railway Company, a Corporation, on the night of January 23, 1958.

Dated this the 3rd day of September, 1959.

Walter G. Burton, Of Counsel for the Plaintiff.
Joseph M. Sanders, Of Counsel for the Defendant.

[fols. 96-115] IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

CARL STILL, Plaintiff,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation, Defendant

TRESPASS ON THE CASE

JUDGMENT—Entered October 16, 1959

This the 5th day of October, 1959, came the parties by their attorneys, and both sides announced ready for trial.

Thereupon, the defendant for plea in its behalf says that it is not guilty in manner and form as alleged in the plaintiff's Amended Declaration filed herein, and of this it puts itself upon the country, and the plaintiff doth the like, and issue is thereon joined.

Thereupon, the defendant tendered and asked leave to file its special plea in writing, entitled Defendant's Special Plea No. 1, to the filing of which Plea the plaintiff objected

and assigned his reasons for his objections to the filing of said Plea in the record, but the Court overruled said objections of the plaintiff and ordered the said Plea to be filed, to which action and ruling of the Court in permitting and allowing the defendant to file Defendant's Special Plea No. 1, the plaintiff at the time objected and excepted.

Thereupon, the plaintiff, Carl Still, tendered to the Court and asked leave to file his written Demurrer to said Defendant's Special Plea No. 1, in which Demurrer the defendant joined, and the Court, after hearing argument upon said Demurrer, is of opinion to and doth overrule plaintiff's Demurrer to Defendant's Special Plea No. 1, to which action [fol. 116] and ruling of the Court in overruling plaintiff's Demurrer to Defendant's Special Plea No. 1, plaintiff at the time objected and excepted.

Thereupon came a jury, to-wit, James E. Thomas and eleven other good and lawful men and women, who were duly selected, impaneled and sworn to well and truly try the matter in issue between the plaintiff and the defendant, and a true verdict render according to the evidence.

Thereupon, the plaintiff and the defendant introduced their evidence before the jury and rested their respective cases, and upon the conclusion of said evidence defendant asked leave of the Court to amend its Special Plea No. 1, and tendered and asked leave to file Defendant's Amended Special Plea No. 1, to the filing of which Amended Special Plea No. 1, the plaintiff at the time objected, and assigned his reasons for his objections to the filing of said Amended Special Plea No. 1 in the record, but the Court overruled plaintiff's said objections and ordered said Defendant's Amended Special Plea No. 1 to be filed, to which action and ruling of the Court in permitting and allowing defendant to file its Amended Special Plea No. 1, the plaintiff objected and excepted.

Thereupon, the plaintiff tendered to the Court and asked leave to file his written Demurrer to Defendant's Amended Special Plea No. 1, in which Demurrer the defendant joined, and the Court, after hearing argument upon said Demurrer, is of opinion to and doth overrule said Demurrer to Defendant's Amended Special Plea No. 1, to which action and ruling of the Court in overruling said Demurrer, the plaintiff at the time objected and excepted.

Thereupon, both plaintiff and defendant having introduced their evidence and rested their respective cases, the defendant moved the Court to direct the jury to find a verdict in favor of the defendant, on the ground and for the reason that plaintiff, Carl Still, in his written appli-
[fol. 117] cation to defendant for employment in July 1951, and in his answers to certain questions propounded to him by Dr. Harold E. Troup, defendant's medical examiner, at the time of plaintiff's examination, had made false and fraudulent answers with respect to his Army service, his medical discharge from the Army, his previous employment, his previous accidents, his physical condition, his past illnesses, and other important and material matters which should have been disclosed to defendant at the time of plaintiff's employment, and that by reason of said false and fraudulent answers to said questions appearing in said application for employment, and said questions propounded to plaintiff by defendant's medical examiner, that plaintiff had fraudulently procured employment as a yard brakeman with defendant, which motion was resisted by plaintiff.

Thereupon said motion, being argued by counsel and considered by the Court, was sustained, and the Court, for reasons set forth in its opinion dictated to the court reporter at the time of passing on said motion, directed the jury to find a verdict in favor of the defendant.

Thereupon, pursuant to the Court's direction, the jury returned the following verdict:

> "We the jury at the direction of the Court, agree and find for the defendant.
>
> James E. Thomas, Foreman"

whereupon the jury was discharged.

Thereupon, the plaintiff moved the Court to set aside the jury's verdict and award to the plaintiff a new trial, on the ground and for the reason that the evidence introduced on behalf of the plaintiff was sufficient to justify the jury in finding a verdict in favor of the plaintiff, which motion was resisted by the defendant and was overruled by the
[fol. 118] Court, to which action and ruling of the Court the plaintiff at the time objected and excepted.

And now proceeding to render judgment on said jury's

verdict, it is considered by the Court that the plaintiff take nothing by his action against the defendant herein, and that judgment be and the same is hereby rendered against the plaintiff, and in favor of the defendant, and it is further considered that the defendant shall have and recover of and from the plaintiff its costs incurred in and about the defense of this action, including a statutory attorney's fee of $10.00.

On motion of plaintiff, execution on the foregoing judgment is suspended for a period of sixty days in order to give the plaintiff an opportunity to apply to the Supreme Court of Appeals of West Virginia for a writ of error and supersedeas to the judgment hereby rendered.

Enter: F. Morton Wagner, Judge. F. Morton Wagner.

Entered on Minute Book No. 35, Page 293, Oct. 16, 1959. L. T. Reynolds, Clerk, Circuit Court, Mercer County. CSW Book; compared, L. C., Decree.

[fol. 119] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

[Title omitted]

DEFENDANTS' SPECIAL PLEA No. 1—Filed October 16, 1959

Now comes the defendant by its attorneys, and for plea in its behalf, says:

That on July 24, 1951, plaintiff made written application to defendant for employment by defendant as a yard brakeman, and that plaintiff signed said written application; that said application contained certain questions which were considered relevant and material by defendant in determining plaintiff's fitness for employment by defendant; that among the questions appearing on said application and so answered by plaintiff, were the following:

"10. Give record of all previous employment in date order (include service with this Company, if any)

Name of Employer	Town or City, and State where Employed	Occupation	From Mo.	From Year	To Mo.	To Year	Reason for Leaving
Peerless Coal Co.	Vivian, W. Va.	Miner, Brakeman	11	1948	7	1951	To get job with Railroad

11. Give Military service and state whether honorably or dishonorably discharged or given a medical discharge: U. S. Army honorably discharged.

[fol. 120] 14. Have you ever been injured? If so, when and at what place—No.

How did it occur?

Extent of injuries?

17. What is the general condition of your health at present? Good"

The said written application further provided, as follows:

> "I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company."

The said application was dated at Bluefield, West Virginia, on July 24, 1951, and was signed by plaintiff.

The said application also contained the following:

> "I have this day filled out Form C. T. 88 which is my application for employment as Yard Brakeman by the Norfolk and Western Railway Company, and I hereby agree that my application is not complete unless and until I shall have passed a physical examination satisfactory to said Company.
>
> I also agree that if I be put into service, prior to such physical examination, then and in that event, if said physical examination is not found satisfactory my continued employment by said Company shall be terminated.
>
> I further agree to bear any expense incurred by me or loss of time brought about in making myself available for this physical examination under the direction of the said Company.
>
> Carl Still".

[fol. 121] Upon the completion of said written application, plaintiff, as instructed by defendant, took said application and went to the office of Dr. Harold E. Troup, defendant's medical examiner, for the purpose of a phyiscal examination; that Dr. Harold E. Troup was defendant's medical examiner at Bluefield, West Virginia, whose duties required him to examine applicants for employment by defendant at Bluefield, West Virginia, and to either approve or disapprove such applications; that thereupon the said Dr. Harold E. Troup, in accordance with his duties, and the purpose of determining plaintiff's physical fitness for employment by defendant as a yard brakeman, propounded certain questions to plaintiff pertaining to plaintiff's health, physical fitness, previous accidents, illnesses, Army service, etc., and said questions were answered by plaintiff's; that among said questions and answers were the followings:

"Have you ever had: Rheumatism? No

A medical discharge from the military service? No (Honorable)

Have you ever had a long or serious illness? No

What injuries have you ever received? No

Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? No

If Former Employe, where employed? No previous employment

Have you been previously examined for employment, if so, when, where, and by whom was examination made? If rejected, state cause or rejection None

Remarks None

that the above questions and answers were reduced to writing and were signed by plaintiff on July 24, 1951.

Defendant further says that Dr. Harold E. Troup, its medical examiner, believed and relied upon said answers [fol. 122] appearing in plaintiff's said written application for employment, and the answers propounded by him to plaintiff, as above set forth, and in reliance upon plaintiff's answers to said questions, and after a superficial physical examination of plaintiff the said Dr. Harold E. Troup approved plaintiff's application for employment

by defendant as a yard brakeman, and thereupon plaintiff was given such employment, and continued in the employment of defendant as a yard brakeman from July 24, 1951, to January 23, 1958, at which time plaintiff claims that he sustained a severe personal injury—a low back disability known as a spondylolisthesis—which has totally and permanently incapacitated him from work.

Defendant further says that it has lately discovered, and now alleges, that the plaintiff, in order to conceal his physical condition and prior medical history from defendant, and to obtain employment from defendant, willfully made false answers to the above mentioned questions contained in said employment application, and to said questions propounded by the said Dr. Harold E. Troup, and defendant says that said answers were false in the following particulars:

1. The answer to question 10 in said application was false, in that the plaintiff willfully failed to state the names of numerous other former employers with whom plaintiff's work record had not been satisfactory.

2. The answer to question 11 in said application was false, in that the plaintiff knowingly and willfully failed to disclose that he had, in the year 1946, received a medical discharge from the United States Army.

3. The answer to question 14 in said application was false, for the reason that plaintiff had previously sustained numerous injuries and had been disabled from said injuries.

4. The answer to question 17 in said application was false, in that the general condition of plaintiff's health at [fol. 123] that time was not good. To the contrary, plaintiff was then suffering from a serious and disabling low back disability, known as spondylolisthesis, and was also suffering from rheumation, which had seriously disabled him in the past.

Defendant further says that the answers to certain questions propounded to plaintiff by Dr. Harold E. Troup, and above referred to, were also false in the following respects:

1. Plaintiff's answer to the effect that he had never had rheumatism was entirely false. To this contrary, plaintiff had, for a long period of time, been seriously disabled with

rheumatism in various parts of his body which confined him to the bed for several months.

2. Plaintiff's answer to the effect that he had not received a medical discharge from the military service was false. In truth and in fact, the plaintiff received a medical discharge from the United States Army in the year 1946 on account of said low back disability, known as spondylolisthesis, and thereafter for a period of approximately three years received compensation from the United States Government on account of said low back disability.

3. The answer to the effect that plaintiff had never had never had a long or serious illness was entirely false. To the contrary, plaintiff had previously been seriously ill over a period of many months with rheumatism in various parts of his body, which seriously disabled the plaintiff and confined him to bed for long periods of time.

4. The statement to the effect that plaintiff never had a physical defect was entirely false. To the contrary, for many years prior to July 24, 1951, plaintiff had suffered with a severe and disabling low back disability known as spondylolisthesis.

Defendant further says that Dr. Harlod E. Troup, its medical examiner, relied upon the answers to said questions [fol. 124] appearing in said application for employment, and believed, and relied upon the other questions propounded by the said Dr. Harold E. Troup to plaintiff, in approving plaintiff's application for employment, but that if the plaintiff had given truthful answers to said questions, that said answers would have disclosed that plaintiff was unfit for employment as a yard brakeman, and that the said Dr. Harold E. Troup would not have approved plaintiff's said employment application, and that plaintiff would not have been employed by defendant.

Defendant further says that plaintiff's employment by defendant was procured by false and fraudulent representations as to material matters, and that such representations were believed and relied upon by the defendant in giving plaintiff employment. Therefore, by reason of such false representations, defendant says that no valid employment agreement ever existed between plaintiff and defendant, and that, therefore, plaintiff never became de-

fendant's employee, and plaintiff cannot maintain this action.

Defendant further says that the condition with which the plaintiff is now complaining, a low back disability known as spondylolisthesis, is the same condition which the plaintiff had while serving in the United States Army, and for which plaintiff received a medical discharge from the United States Army and disability payments for a period of approximately three years.

Norfolk and Western Railway Company, a Corporation, By Counsel.

Sanders & Sanders, Attorneys for Defendant, Norfolk and Western Railway Company.

[fol. 125] *Duly sworn to by Joseph M. Sanders, jurat omitted in printing.*

[fol. 126] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

[Title omitted]

DEMURRER—Filed October 16, 1959

Now comes the plaintiff, Carl Still, on this Monday morning, October 5, 1959, and demurs to the "Defendant's Special Plea No. 1" for the following reasons:

(1) At the pre-trial conference held in this case on the 10th day of August, 1959, when the issues in this case were made up, Mr. Joseph M. Sanders, Sr., attorney for the defendant railroad company, admitted at that pre-trial conference that the plaintiff, Carl Still, was an employee of the defendant railroad company and made no mention whatsoever of the fact that the railroad company contended or would contend at the trial of this case that Carl Still was not an employee of the railroad company on the morn-

ing of January 23, 1958, when it is alleged that he was injured, and we here tender and crave oyer, as soon as the court reporter can write it up, the statements of Mr. Joseph M. Sanders, Sr., attorney for the railroad company, at the pre-trial conference and ask that said statements be made a part of this Demurrer the same as if herein copied verbatim;

[fol. 127] (2) By a written stipulation dated the 3d day of September, 1959, and signed by Mr. Joseph M. Sanders, Sr., attorney for the defendant railroad company, he stipulated and agreed that Carl Still, the plaintiff, was an employee of the defendant railroad company at the time he claims he was injured on January 23, 1958, and that at the time Carl Still claims he was injured that Carl Still was working for the defendant railroad company at said time as an employee and was engaged in interstate commerce under the provisions of the Federal Employers' Liability Act. That stipulation was filed in the case by order of the Court, and we ask that this stipulation be made a part of this Demurrer the same as if it were copied herein verbatim;

(3) The evidence and the record in this case will disclose beyond any doubt that the railroad company has had the records of Carl Still's employment in this case in their files and has had them since July 24, 1951, and that it has known since this case was instituted in this Court and prior to the pre-trial conference and prior to the stipulation set out in the two foregoing grounds of this Demurrer all about the things alleged now in "Defendant's Special Plea No. 1";

(4) The defendant railroad company by its conduct prior to the pre-trial conference and at the pre-trial conference and by its stipulation is now estopped and precluded from filing or setting up its alleged defense under "Defendant's Special Plea No. 1";

[fol. 128] (5) The Special Plea comes too late in this case;

(6) The defendant railroad company is taking inconsistent and untenable positions in this case, which cannot be done;

(7) "Defendant's Special Plea No. 1" is not sufficient in law and fails to state a defense under the Federal Employers' Liability Act;

(8) The issues in this case were made up long prior to the setting of this case for trial on October 5, 1959, and the "Defendant's Special Plea No. 1" is confusing and misleading and destroys the issues already made up in this case;

(9) The record and evidence in this case will show that Carl Still ceased his employment with the defendant railroad company in the month of October, 1956, and that he later, in the month of November, 1957, entered into a new contract of employment with the defendant railroad company and returned to work as a new employee and under a new contract with the defendant railroad company in the month of November, 1957, thereby doing away with any contract of employment which was entered into between the plaintiff and the defendant railroad company in the month of July, 1951; and

(10) For other objections and defenses apparent upon the face of "Defendant's Special Plea No. 1."

Dated this the 5th day of October, 1959.

Carl Still, By Counsel.

Burton, Griffith, Burton and Burkett, Walter G. Burton, Attorneys for the Plaintiff.

[fol. 129] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

[Title Omitted]

DEFENDANT'S AMENDED SPECIAL PLEA NO. 1—Filed October 16, 1959

Now comes the defendant by its attorneys, and for plea in its behalf, says:

That on July 24, 1951, plaintiff made written application to defendant for employment by defendant as a yard brakeman, and that plaintiff filled out, and signed, said written application; that said application contained certain ques-

tions which were considered relevant and material by defendant in determining plaintiff's fitness for employment by defendant; that among the questions appearing on said application and so answered by plaintiff, were the following:

"10. Give record of all previous employment in date order (include service with this Company, if any)

Name of Employer	Town or City, and State where Employed	Occupation	From Mo.	From Year	To Mo.	To Year	Reason for Leaving
Peerless Coal Co.	Vivian, W. Va.	Miner, Brakeman	11	1948	7	1951	To get job with Railroad

11. Give Military service and state whether honorably or dishonorably discharged or given a medical discharge: U. S. Army honorably discharged.

[fol. 130] 14. Have you ever been injured? If so, when and at what place No.

How did it occur?

Ext nt of injuries?

17. What is the general condition of your health at present? Good."

Defendant further says that the foregoing answers were false and were well known by plaintiff to be false, when made, and that said answers were made by the plaintiff for the purpose of fraudulently and deceitfully concealing his physical condition and past medical history, and obtaining employment with defendant.

The said written application further provided, as follows:

"I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company."

The said application was dated at Bluefield, West Virginia, on July 24, 1951, and was signed by plaintiff.

The said application also contained the following:

"I have this day filled out Form C. T. 88 which is my application for employment as Yard Brakeman by the Norfolk and Western Railway Company, and I hereby

agree that my application is not complete unless and until I shall have passed a physical examination satisfactory to said Company.

I also agree that if I be put into service, prior to such physical examination, then and in that event, if said physical examination is not found satisfactory my continued employment by said Company shall be terminated.

[fol. 131] I further agree to bear any expense incurred by me or loss of time brought about in making myself available for this physical examination under the direction of the said Company.

Carl Still".

Upon the completion of said written application, plaintiff, as instructed by defendant, took said application and went to the office of Dr. Harold E. Troup, defendant's medical examiner, for the purpose of a physical examination; That Dr. Harold E. Troup was defendant's medical examiner at Bluefield, West Virginia, whose duties required him to examine applicants for employment by defendant at Bluefield, West Virginia, and to determine their physical fitness for employment by defendant, and to either approve or disapprove such applications; that thereupon the said Dr. Harold E. Troup, in accordance with his duties, and for the purpose of determining plaintiff's physical fitness for employment by defendant as a yard brakeman, propounded certain questions to plaintiff pertaining to plaintiff's health, physical fitness, previous accidents, illnesses, Army service, etc., and said questions were answered by plaintiff; that among said questions and answers were the following:

"Have you ever had: Rheumatism? No.

A medical discharge from the military service? No (Honorable)

Have you ever had a long or serious illness? No

What injuries have you ever received? No

Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? No

If Former Employe, where employed? No previous employment

Have you been previously examined for employment, if so, when, where, and by whom was examination [fol. 132] made? If rejected, state cause of rejection

None

Remarks "None";

that the above questions and answers were reduced to writing and were signed by plaintiff on July 24, 1951.

Defendant further says that all of the foregoing answers were false and were known to be false by the plaintiff at the time said answers were given, and that said false answers were given and made by the plaintiff for the purpose of fraudulently and deceitfully concealing his true physical condition and past medical history from the defendant, and to obtain employment with defendant.

Defendant further says that Dr. Harold E. Troup, its medical examiner, believed, and relied upon, said answers appearing in plaintiff's said written application for employment, and the answers propounded by him to plaintiff, as above set forth, and in reliance upon plaintiff's answers to said questions, and after a superficial, or screening, physical examination of plaintiff, the said Dr. Harold E. Troup approved plaintiff's application for employment by defendant as a yard brakeman, and thereupon plaintiff was given such employment, and continued in the employment of defendant as a yard brakeman from July 24, 1951, to January 23, 1958, at which time plaintiff claims that he sustained a severe personal injury—a low back disability known as spondylolisthesis—which has totally and permanently incapacitated him from work.

Defendant further says that had truthful answers to the foregoing questions been given by plaintiff to the said Dr. Harold E. Troup, that said answers would have disclosed plaintiff's physical unfitness for employment as a yard brakeman by the defendant, and that the said Dr. Harold E. Troup would not have approved the plaintiff for employment by the defendant.

Defendant further says that it has lately discovered, and [fol. 133] now alleges, that the plaintiff, in order to conceal his physical condition and prior medical history from defendant, and to deceitfully and fraudulently obtain employment from defendant, willfully and intentionally made

false answers to the above mentioned questions contained in said employment application, and to said questions propounded by the said Dr. Harold E. Troup, and defendant says that said answers were false in the following particulars:

1. The answer to question 10 in said application was false, in that the plaintiff willfully and intentionally failed to state the names of numerous other former employers with whom plaintiff's work record had not been satisfactory.

2. The answer to question 11 in said application was false, in that the plaintiff knowingly and willfully failed to disclose that he had, in the year 1946, received a medical discharge from the United States Army.

3. The answer to question 14 in said application was false, for the reason that plaintiff had previously sustained numerous injuries and had been disabled from said injuries. Prior to the year 1945, the plaintiff had been injured in an automobile accident which caused serious injuries to his back, and to his side, and in obtaining a medical or disability discharge from the United States Army in the year 1946, the plaintiff complained of said automobile accident and said low back disability and injuries to his side, and by means of said complaints, particularly the complaints with reference to his low back disability, obtained a medical or disability discharge from the United States Army.

4. The answer to question 17 in said application was false, in that the general condition of plaintiff's health at that time was not good. To the contrary, plaintiff was then suffering from a serious low back disability, known as [fol. 134] spondylolisthesis, and was also suffering from rheumatism, which had seriously disabled him in the past and confined him to the bed for several months.

Defendant further says that the answers to certain questions propounded to plaintiff by Dr. Harold E. Troup, and above referred to, were also false in the following respects:

1. Plaintiff's answer to the effect that he had never had rheumatism was entirely false. To the contrary, plaintiff had, for a long period of time, been seriously disabled with rheumatism in his back and in various parts of his body which had confined him to the bed for several months.

2. Plaintiff's answer to the effect that he had not received

a medical discharge from the military service was false. In truth and in fact, the plaintiff received a medical discharge from the United States Army in the year 1946 on account of said low back disability, known as spondylolisthesis, and thereafter for a period of approximately three years received compensation from the United States Government on account of said low back disability.

3. The answer to the effect that plaintiff had never had a long or serious illness was entirely false. To the contrary, plaintiff had previously been seriously ill over a period of many months with rheumatism in his back, and various parts of his body, which seriously disabled the plaintiff and confined him to bed for long periods of time.

4. The statement to the effect that plaintiff never had a physical defect was entirely false. To the contrary, for many years prior to July 24, 1951, plaintiff had suffered with a serious low back condition known as spondylolisthesis, and his fifth lumbar vertebra was displaced forward over the sacrum a distance of at least one-half the diameter of the fifth lumbar vertebra.

[fol. 135] Defendant further says that Dr. Harold E. Troup, its medical examiner, believed, and relied upon the answers to said questions appearing in said application for employment, and believed, and relied upon the answers to the other questions propounded by the said Dr. Harold E. Troup to plaintiff, in approving plaintiff's application for employment, but that if the plaintiff had given truthful answers to said questions, that said answers would have disclosed that plaintiff was unfit for employment as a yard brakeman, and that the said Dr. Harold E. Troup would not have approved plaintiff's said employment application, and that plaintiff would not have been employed by defendant.

Defendant further says that it did not discover or suspect until subsequent to January 23, 1958, the date of plaintiff's alleged accident and injuries, that plaintiff had given false and fraudulent answers to the above questions, or that palintiff had the above described low back condition, or was otherwise physically unfit for employment by defendant.

Defendant further says that plaintiff's employment by defendant was procured by false and fraudulent representations as to material matters, and that such representations

were believed, and relied upon by the defendant in giving plaintiff employment. Therefore, by reason of such false representations, defendant says that no valid employment agreement ever existed between plaintiff and defendant; that plaintiff never become defendant's employe, and plaintiff cannot maintain this action under the Federal Employers Liability Act, or otherwise.

Defendant further says that the condition with which the plaintiff is now complaining—a forward displacement of the fifth lumbar vertebra over the sacrum, known as spondylolisthesis—is the same condition which the plaintiff had while serving in the United States Army in 1945 and 1946, and for which plaintiff received a medical discharge from the United States Army, and disability payments for over a period of approximately three years, and is the same condition which plaintiff had when examined by Dr. Harold E. Troup in July 1951. Defendant further says that there was, and is a direct causal relationship between the false [fol. 136] and fraudulent answers so given by plaintiff, and the injury alleged to have been sustained by the plaintiff, in that the damages now claimed by the pl intiff are for an aggravation of such preexisting low back condition.

Norfolk and Western Railway Company, a Corporation, By Counsel.

Sanders & Sanders, Attorneys for Defendant, Norfolk and Western Railway Company.

[fol. 137] *Duly sworn to by Joseph M. Sanders, jurat omitted in printing.*

[fol. 138] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

[Title omitted]

DEMURRER—Filed October 16, 1959

Now comes the plaintiff, Carl Still, and demurs to the defendant's amended special plea No. 1 for the following reasons:

(1) The defendant's amended special plea No. 1 is filed too late and comes too late, and after all the evidence in this case had been introduced, both for the plaintiff and the defendant;

(2) The Defendant's amended special plea No. 1 comes too late for the following reason: At the pre-trial conference held in this case heretofore on the 10th day of August, 1959, when the issues were made up, Mr. Joseph M. Sanders, Sr., attorney for the defendant railroad company, admitted that the plaintiff, Carl Still, was an employee of the defendant railroad company and made no mention whatsoever of the fact that the railroad company contended or would contend Carl Still was not an employee of the railroad company on the morning of January 23, 1958, when it is alleged that [fol. 139] he was injured, and we tender as soon as the court reporter can write it up the statements Mr. Joseph M. Sanders, Sr., made as to his defenses in that pre-trial conference and ask that they be made a part of this objection the same as if herein stated verbatim;

(3) The Amended Special Plea comes too late for the following reason: By a written stipulation dated on the 3d day of September, 1959, and signed by Mr. Joseph M. Sanders, Sr., attorney for the defendant railroad company, he stipulated and agreed that Carl Still, the plaintiff, was an employee of the defendant railroad company at the time he claims he was injured on January 28, 1958, and that Carl Still was working for the defendant railroad company at said time and was engaged in interstate commerce. We ask that this stipulation be made a part of this motion;

(4) The defendant railroad company is now estopped and precluded from filing this plea, Defendant's Amended Special Plea No. 1, setting up any such alleged claimed defenses as the Amended Special Plea attempts to set up and inject in this case;

(5) The Amended Special Plea is not sufficient in law and fails to state a defense in law under the Federal Employers' Liability Act;

(6) The Amended Special Plea is confusing, misleading and would confuse the real issues in this law action. The Amended Special Plea is not proper because the evidence shows that the plaintiff, Carl Still, was dismissed from the service of the defendant railroad company in October of 1956 and was kept out of service until November, 1957, at [fol. 140] which time he was again employed and a new contract of employment entered into between Carl Still and the defendant railroad company, entirely doing away with any contract of employment between Carl Still and the railroad company as of July 24, 1951, on which said Amended Special Plea is based; and

(7) For other objections apparent upon the face of the Amended Special Plea.

Dated this the 14th day of October, 1959.

Carl Still, By Counsel.

Burton, Griffith, Burton and Burkett, Walter G. Burton, Attorneys for the Plaintiff.

[fols. 141-144f] [File endorsement omitted]

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

[Title omitted]

AFFIDAVIT--Filed May 5, 1960

STATE OF WEST VIRGINIA,
County of Mercer, To-Wit:

This day personally appeared before the undersigned authority, Walter G. Burton, who, after being duly sworn, deposes and says that he is one of the attorneys who represented the plaintiff, Carl Still, in the trial in the Circuit Court of Mercer County, West Virginia, commencing on the 5th day of October, 1959, in the above styled case, which said trial resulted in a directed verdict for the defendant, Norfolk & Western Railway Company, and a judgment was entered on said verdict on October 16, 1959;

That, subsequent thereto, on November 24, 1959, the Norfolk & Western Railway Company held and conducted a hearing or investigation in the office of the Superintendent, Division Office Building, Bluefield, West Virginia, concerning a charge against the plaintiff, Carl Still, of "Falsifying your application for employment as yard brakeman, and false statements made by you in connection with physical [fol. 144g] examination for employment, July 24, 1951";

That, as a result of said hearing or investigation, the plaintiff, Carl Still, by letter dated December 7, 1959, and signed by R. F. Dunlap, Superintendent, was formally dismissed from the service of the Railroad on the assigned ground of falsifying his application for employment, and false statements made in connection with his physical examination for employment, on July 24, 1951. A copy of said letter is attached hereto and asked to be taken and read as a part of this Affidavit as if incorporated herein verbatim, and further affiant saith not.

Walter G. Burton.

Taken, subscribed and sworn to before the undersigned authority, this 5th day of May, 1960.

My commission expires June 26, 1961.

Evelyn B. Myers, Notary Public.

[fols. 144h-193] ATTACHMENT TO AFFIDAVIT

Falsifying application for employment as Yard Brakeman and false statements made in connection with physical examination for employment, July 24, 1951—Carl Still—Dismissed—

NORFOLK AND WESTERN RAILWAY COMPANY

Office of Superintendent

Pocahontas Division

Bluefield, W. Va.

December 7, 1959

R. F. Dunlap
Superintendent

Mr. Carl Still,
Yard Brakeman.

DEAR SIR:

You have been dismissed from the service for falsifying application for employment as Yard Brakeman and false statements made in connection with physical examination for employment, July 24, 1951.

Yours truly, R. F. Dunlap, Superintendent.

[fols. 194-199] IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

Case No. 5734

CARL STILL, Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Defendant

TRESPASS ON THE CASE

Plaintiff's Bill of Exceptions No. 1

COLLOQUY

Be it remembered, that on Monday, the 5th day of October, 1959, upon the trial of this case, after the jury had been duly impaneled, but before the jury was sworn, the following proceedings were had in this case:

* * * * * * *

[fol. 200] Mr. Sanders, Sr.: Your Honor, at this time the defendant pleads not guilty, and also the defendant tenders and asks leave to file Defendant's Special Plea No. 1, which is in writing. I have furnished Mr. Burton with a copy of this plea.

* * * * * * *

[fol. 201] OBJECTIONS TO FILING OF SPECIAL PLEA NO. 1

Mr. Walter G. Burton: Now, Your Honor, we never heard of this plea until it was delivered at our office on this past Saturday between twenty minutes until twelve and twelve o'clock noon by Mr. Shaffer, and we, of course, haven't had a lot of time until this morning to go into this plea, but we assign the following objections to the filing of this plea:

[fol. 202] One: At a pre-trial conference held in this case heretofore, on the tenth day of August, 1959, when the issues were discussed and made up, Mr. Joseph M. Sanders, Sr., attorney for the defendant Railroad Company, admitted

the plaintiff, Carl Still, was an employee of the defendant Railroad Company and made no mention whatsoever of the fact that the Railroad Company at that time contended, or would contend, Carl Still was not an employee of the Railroad Company on the morning of January 23rd, 1958, when it is alleged that he was injured; and we tender, as soon as the Court Reporter can write it up, the statement of Mr. Joseph M. Sanders, Sr., made as to his defense in that pre-trial conference and ask that the remarks then made by Mr. Sanders at the pre-trial conference and the defenses he interposed to this action be made a part of this motion as if the same were stated herein verbatim.

EXCERPTS FROM PRE-TRIAL CONFERENCE HELD AUGUST 10, 1959

At a pre-trial conference held in this case on Monday, the 10th day of August, 1959, at 10:18 o'clock a.m., in the Chambers of the Court in the Court House in Princeton, Mercer County, West Virginia, after the position of the plaintiff was stated into the record at length by Mr. Walter G. Burton, the following proceedings were had:

[fol. 203] "Mr. Sanders, Sr.: Well, Your Honor, I think Mr. Burton has stated substantially the way the accident occurred. There will be, I think, some conflicting statements, I think, as to how it occurred, but we will admit that the train did couple up with the car on which Still was riding. We don't know whether he was injured on that occasion or not, and we take the position that the burden is on him, even if there was negligence on the part of the Railway Company, to prove the injuries he alleges in the declaration. I can't recall offhand of anyone that actually saw the accident, and it may be that he's the only person that knows exactly how he was injured, if he was injured.

We deny that the Railroad Company was guilty of any negligence. We deny that the plaintiff was injured in the manner and to the extent that he alleges, and we deny now that he is totally and permanently disabled from work.

That's about all we have to say about it.

The Court to Mr. Sanders, Sr.: What is your posi-

tion with reference to the car backing into or coupling into the car?

Mr. Sanders, Sr.: It did couple into it.

The Court: That it was done pursuant to proper signals?

Mr. Sanders, Sr.: Yes, sir.

Mr. Walter G. Burton: Judge, pardon me; I don't want to bother Your Honor and I don't want to jump in—was Your Honor through? I want to ask Mr. Sanders some questions for the record.

The Court: All right.

Mr. Walter G. Burton: Now, as I understand from [fol. 204] Mr. Sanders, he claims or one of his defenses will be that this man was not injured on this occasion. Now, if I am wrong, I want to find it out. In other words, he wasn't hurt there?

Mr. Sanders, Sr.: I say he was not injured in the manner and to the extent that he claims. It's possible he was jolted maybe and knocked against the side of the car to some extent. I don't say that he didn't have a mark on him, that he didn't strike the car. But I simply say we deny he was injured in the manner and to the extent he claims, and we will expect the plaintiff to prove that he was. He is the man that knows about that. The burden of proof is on him to do it. In other words, we are not admitting these injuries that they claim in the declaration.

Mr. Walter G. Burton: Well, do you claim he was ever injured prior to this time in his back?

Mr. Sanders, Sr.: We don't know.

Mr. Walter G. Burton: You don't know?

Mr. Sanders, Sr.: We don't know, have no positive knowledge of that at this time.

Mr. Walter G. Burton: Well, do you have any knowledge that he was ever prior injured?

Mr. Sanders, Sr.: Well, let me ask you a question. Do you claim he never had been previously injured in the back?

Mr. Walter G. Burton: I sure do.

Mr. Sanders, Sr.: You claim that?

Mr. Walter G. Burton: I claim that he had never [fol. 205] been to a doctor, that he worked in the coal

mines, about his back; that he could go up these ladders with his arms and without using his legs or his back, that he could go up them, he was that strong. He could go up those ladders with his arms.

Mr. Sanders, Sr.: You claim he never had any previous back injuries or previous back disabilities?

Mr. Walter G. Burton: That's right; and had never been to any physician about those matters.

Mr. Sanders, Sr.: As far as his back was concerned, he was perfectly strong and able-bodied at the time he was injured?

Mr. Walter G. Burton: That's right. And I was trying to find out from you, do you claim he did have any injuries?

Mr. Sanders, Sr.: I don't have any positive knowledge at this time that he had any injuries, but it may be that we will acquire that, and if we do, I'll tell you about it. But I have no positive knowledge at this time that he was injured.

Mr. Walter G. Burton: Well, you say, now, that he wasn't injured in the manner in which we say he was. What manner do you claim if he was injured, which you don't admit—how did he get the condition he's got now? And your doctors personally agree that he's got this fifth lumbar vertebra, the last one, knocked forward on the sacrum. Is it your contention that he has a spondylolisthesis and that that's congenital and he had that all the time, and that's what gave him this?

Mr. Sanders, Sr.: It could be. That condition is frequently congenital. And it could be he was injured [fol. 206] previously. I say, I have no positive knowledge of those things. But what I am saying, we are going to require you to prove that he was injured in the manner that he said he was injured and that he was disabled by this accident as he claimed he was disabled. The burden of proof is on you.

Mr. Walter G. Burton: Yes, I realize that.

The Court: Mr. Sanders, as I understand him, says the train did jolt him and that there is no evidence of serious injury following this jolting, as I understand you.

Mr. Sanders, Sr.: That's exactly right. And he has

told several conflicting stories about how he was injured. I think it will be up to the jury which one to believe, and I think it will be up to the jury to determine from his own evidence and from the evidence of the people down there if he was injured and to what extent he was injured and whether he is disabled. That's the plaintiff's case. We are going to expect him to prove all those things.

Mr. Walter G. Burton. We accept the challenge that the burden is on us to prove our case in all respects. That's all I wanted to ask, I think, Your Honor.

The Court: All right, sir."

OBJECTIONS TO FILING OF SPECIAL PLEA No. 1 (Continued)

Mr. Walter G. Burton (Continuing): Two: By a written stipulation dated in this case on the third day of September, 1959, which written stipulation was filed as a part of this case on—by order of September 10th, 1959, Mr. Joseph M. [fol. 207] Sanders, Sr., attorney for the Railroad Company, stipulated and agreed that Carl Still, the plaintiff, was an employee of the defendant Railroad Company at the time he claims he was injured on January 23rd, 1958, and that Carl Still was working for the defendant Railroad Company at said time and was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. We make that stipulation and the order filing that stipulation a part of this number two objection.

Three: We think that the Railroad Company, the defendant, is now estopped and precluded from filing this plea, "Defendant's Special Plea No. 1," setting up any such alleged, claimed defenses as the Special Plea attempts to set up and inject in this case.

Four: The defendant Railroad Company is taking inconsistent and untenable positions in this case, which cannot be done.

Five: The Special Plea comes too late in this case.

Six: The Special Plea is not sufficient in law and fails to state a defense under the Federal Employers' Liability Act.

Seven: It is not proper to file this Special Plea in a law case, and the Special Plea is confusing, misleading, and would confuse the real issues in this law action.

Eight: The Special Plea would not be proper in a law

[fol. 208] action under the Federal Employers' Liability Act, but only in an equity case. And

Nine: For other objections apparent upon the face of the Special Plea.

In other words, Judge, we say that they committed themselves at the pre-trial conference, and they committed themselves when they stipulated that he was an employee and engaged in interstate commerce, and that those two things alone prohibit them from now filing this plea, along with the other objections just dictated.

COLLOQUY

The Court: Would you gentlemen (to counsel for the defendant) care to say anything about the timeliness of the filing of this plea? It rather occurs to the Court that if such plea had been filed some time ago, we could have gone into the matters. But at this late hour, if the Court just permits such plea to come in here, I think it would be confusing and misleading.

Mr. Sanders, Sr.: Your Honor, may I be heard on this?

The Court: Yes, sir.

Mr. Sanders, Sr.: I think first the Court ought to read the plea.

The Court: I'll do that.

[fol. 209] Mr. Sanders, Sr.: I think the Court ought to read the plea.

At the time we entered into this stipulation, I did that for the convenience of Mr. Burton. The fact is we had not determined at that time—it had not occurred to me at that time, in examining the file, the legal question that was involved here. I did not have the information, I did not have the facts, I did not have the law, which justified us in filing this plea. I think, clearly, that the plea—the—that the plea sets forth facts which under the law, which if true, would preclude recovery in the case.

The Court: Law for the Court?

Mr. Sanders, Sr.: Well, I don't know what—of course, I don't know what their defense to it would be; but unless there is some defense to it, I think that unless the facts are denied, that it would be as a matter of law.

Now, it's true that we did enter into this stipulation, as I say, for Mr. Burton's convenience, without having this

particular issue—without having this particular defense in mind at all.

Now, the cases that discuss this matter do hold that fraudulent representations by which an employee obtains employment is a defense to an action under the Federal [fol. 210] Employers' Liability Act, and they go on to say that, a good many of them, that by virtue of these false representations, that there was no valid agreement of employment, and no valid employment agreement was entered into, and that, therefore, no employee status was created.

Now, of course, in this case after the plaintiff did make application in 1951, and that he did start working as a yard brakeman, and did start earning money, then that is true that he worked—he continued to be an employee from 1951 up until 1958—January, 1958—and he was injured on January 23rd, and then that's the last that he worked. But in a sense, of course, he was an employee of the Company. He did work; he did do the work, and he was during that time engaged in interstate commerce. So, what we did there was to stipulate, as I say, for Mr. Burton's convenience, without having this particular defense in mind and without considering this aspect of the case at all.

Now, this is an important question, and I think the Court will see it when you read the plea, and that in the interest of justice, that this is a matter that the Railroad Company has a right to submit to the jury—to the Court, which should be considered.

Now, I handed this plea to Mr. Burton on last Saturday because it was just at that time that we decided that it should be filed as a Special Plea, and we felt that the in- [fol. 211] formation was complete that justified its filing. And I think if Mr. Burton had wanted a continuance of the case this morning, I wouldn't have opposed it under the circumstances. There was no time limit on filing the plea, and I think that in the interest of justice that the Court—that the plea should—I don't think we should be bound by an inadvertent stipulation that we made without this particular defense being in our mind at all, without any intention of stipulating as to a proposition like we set up here. Now, that's the point. A lot of times, Your Honor, the Courts have—even where stipulations have been entered into, when they have been stipulations under misapprehen-

sion or made inadvertently, the Courts have relieved counsel from them.

Now, in this case, as I say, in a sense this man was working; he was on the pay-roll of the Company and was working and earning money; but in a sense, as discussed in these cases that we rely on, that employment contract was procured by fraud, and for that reason he can't maintain this action. So, that's the——

The Court: You maintain it's a jury question then by your —under the Special Plea?

Mr. Sanders, Sr.: At the very most it would be that, Your [fol. 212] Honor. And if the facts stated in my plea are not contradicted, it will be a question of law for the Court, I maintain. And I think the law is clear that where a man obtains employment by fraud as to his physical condition and as to his ability to perform as an employee, that that is an absolute defense, particularly, Your Honor, in a case like this.

This man had this low back disability—that low—the spondylolisthesis, as far back as 1945 when he went in the Army; that he was examined and given a medical discharge from the Army on account of this very precise condition that he is now suing the Railroad Company for; exactly the same condition: he was discharged from the Army. And I think that it's a case that in the interest of justice, that even in spite of the stipulation which we inadvertently made—I mean, we didn't have in mind a defense of this kind at all—the Court is here to do justice between the parties in the case, and a legitimate defense of this kind, I submit we shouldn't be deprived of it by reason of that stipulation.

Now, if counsel had wanted a continuance in the case, we wouldn't have objected to it. We don't object to it, if they want a continuance—we are ready—if they want more time to go into it. We think that in the interest of justice we certainly should have a right to file this plea, and then they could meet it by any proper evidence they have. And I [fol. 213] would like the Court to examine the plea and see what the situation is we have developed in this plea.

The Court: I'll hear anything you gentlemen (to counsel for the plaintiff) want to say. I want to read the plea and look to the matters during the noon hour. The worst part

is, to me, I haven't had the advantage of reading these cases, and I don't know whether it comes under the Federal Employers' Liability Act or not, whether such defense could be interposed. Mr. Sanders states it can. I suspect that's right. Fraudulent representations as just in insurance cases, and so forth, would be a valid defense under the Federal Employers' Liability Act. But I must confess it comes at a late hour, and I am not familiar with it.

Mr. Walter G. Burton: Your Honor, we do not move for any continuance. We are ready to try this case and so announce.

Of course, Mr. Sanders knew that we weren't in our offices, I assume, on Saturday afternoon. As a matter of fact, I left my offices on this past Saturday, the third of October, at twenty minutes until twelve. Now, as I understand, Mr. Shaffer brought that in there, this plea, and left it with my—one of my secretaries, Mrs. Cook, some time between twenty minutes to twelve and twelve o'clock noon [fol. 214] on the third.

Now, he says he didn't have this information. Now, let's see if he had. They had the cards where Dr. Troup, their examining physician, examined Carl Still prior to the twenty-fourth day of July, 1951, when he was employed as a yard brakeman. Mr. Sanders has had those cards I don't know how long, but Dr. Troup said he did have them.

Now, I had understood that maybe they contended that prior to the time Carl Still was hurt on January 23rd, 1958, that he had had this congenital spondylolisthesis. Now, on the afternoon of September 17th, 1959, at two o'clock, or thereabout, I couldn't find out exactly what proof, if any, the gentlemen had of the fact that they claimed Carl Still had this congenital spondylolisthesis, and I called Mr. Sanders and asked him if he would please tell me, on the seventeenth of September, just what they were going to rely on; and Mr. Sanders was kind enough—although he hadn't told me before that time, and I couldn't make him, and that was his business, and that was his right—but he was kind enough to tell me that this man had been in the Army, Carl Still, and had had this trouble with his back and that he did have this spondylolisthesis. Now, I know that Mr. Sanders knew that prior to the seventeenth of September, and I know that he knew it on the seventeenth day

[fol. 215] of September, and still from that day until this no plea was ever tendered.

Mr. Sanders, Sr.: I might say this further, Your Honor, that even though we did stipulate before we—before we knew under the law we could advance this defense—there are a lot of legal problems in here—we did make that stipulation, but I don't think the stipulation, if you accepted it at face value, would deny us the right or estop us from filing this plea because we have never at any time admitted that the plaintiff did not obtain employment by fraud. We have never admitted that. The most that we said, he was an employee and engaged in interstate commerce; and, of course, in a sense that was true. He was certainly acting —doing the work of an employee and was drawing a salary. But we have never—we have never conceded that he did not obtain his employment by false representations. We have never conceded that. And, as a matter of fact, the information, the full information, which I set out in this, came to me just last week. I had some of it, that's true, but the greater part of it came to me last week in the cards that I obtained—the original cards that I obtained setting out this information that I have got.

Now, as I say, I put this plea in Mr. Shaffer's hands Saturday with the request that he deliver it personally to [fol. 216] Mr. Burton. I wanted him to have it before today. If the gentlemen had asked for a continuance, we wouldn't have objected to it. However, I think they are in a position to meet this because the only thing that we expect to file in support of it is the applications that he has made for employment, and then set out the other evidence that we would have a right to set out under the general issue in the case as to his Army medical record and the previous condition of his health. It's a matter, as I see it, now, if they are prepared on the law on it, certainly can be prepared on the facts.

But I think if Your Honor will read the plea, you will see that it does present a very material and a very important defense, which we should not be deprived of.

The Court: As I understand you, you already contend you are entitled to most of the matters you set up in your Special Plea to come in under the general issue.

Mr. Sanders, Sr.: That's right. In other words, Your

Honor, we've got a right—I don't think they will dispute this—to show his past medical history, go back and show the condition of his health, his injuries, and his Army medical record; the fact that he got a medical discharge from the [fols. 217-218] Army on account of this low back condition. And the only other thing that we have here would be to show the representations he made to the Railroad Company when he got employment. Factually, that is the only new thing we are bringing into the case. The other is a question of law. And then those records, we submit, are admissible for the purposes of contradiction as to material matters. But——

The Court: The only thing that you contend you would be deprived of would be the representations?

Mr. Sanders, Sr.: Yes, sir, that's all. We certainly have got a right to show his previous condition of health and all that as the very basis for it. And then the representations he made to the company, and that's the case. Then it resolves itself into a question for the jury if they deny any of those things; otherwise, a question of law for the Court.

The Court: Anything further, gentlemen?

Mr. Walter G. Burton: Not at this time, Your Honor.

The Court: All right. We'll quit until one-thirty.

* * * * * * *

[fol. 219] IN CHAMBERS

The Court: Taking up this matter of the Special Plea, two problems are presented to the Court, as I see it: The first is the timeliness of the Special Plea, and, second, whether or not it can be presented under the Federal Employers' Liability Act.

Taking them up in reverse order, Mr. Sanders states that [fols. 220-224] he has ample authority to the effect that it may be done. I will have to act on such assumption if I permit it because I have not read any cases on such a question and have not had it before presented to this Court.

OBJECTIONS TO FILING OF SPECIAL PLEA OVERRULED

As to the timeliness of the matter, this is presented at a late date, but I would have a good deal of hesitancy in holding that the defendant company is now estopped from

presenting this Special Plea. Our Supreme Court and trial courts in West Virginia adopt a very liberal policy in allowing amendments, pleas, and, as I stated, I would hesitate to not permit it, and I believe that it may be done.

. . . . . .

[fol. 225] Mr. Walter G. Burton: What we want, Judge—now, as I understand, the Court has overruled our objections to the filing of the Special Plea.
[fol. 226] The Court: Yes, sir.

. . . . . .

[fol. 227] Mr. Walter G. Burton: Now, Judge, may I say this, please: Now, I understand that we are filing the demurrer and the demurrer is overruled?

The Court. Yes, sir.

. . . . . .

Mr. Walter G. Burton: All right. Now, in order to get to the issue, we repiy and deny generally and specially the allegations of the Special Plea filed—Special Plea No. 1 filed by the defendant and reply generally to it. Now, that makes our issues, I think.

The Court: All right, gentlemen.

. . . . . .

[fol. 228] Be it Further Remembered, that thereupon, after the jury was duly sworn and opening statements had been made to the jury on behalf of the plaintiff and defendant by their respective counsel, the plaintiff, to maintain the issue on his behalf, introduced the following evidence, to-wit:

[fol. 229] Dr. Roy M. Hoover, a witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter G. Burton:

* * * * * * *

Q. 3. What is your profession?
A. Orthopedic surgeon.
Q. 4. How long have you been an orthopedic surgeon?
A. Since 1923.

* * * * * * *

[fols. 230-233] Q. 9. When did you graduate at the University of Virginia?
A. 1919.

* * * * * * *

[fol. 234] Q. 38. Doctor, on May 15th, 1959, did you examine a colored man by the name of Carl Still——
A. I did.

* * * * * * *

Q. 43. Do you remember what kind of a back brace he was wearing?
[fol. 235] A. It was what we call a Knight back brace.
Q. 44. Would you explain that a little in detail for His Honor and the jury and the record?
A. It is a metal brace with two uprights on either side of the midline up the back, a metal band around the pelvis, a metal band at the top, and uprights on either side down in the axillary line. This is attached to a canvas apron, as we speak of it, in front and holds the brace to his body.

* * * * * *

[fol. 236] Q. 53. Doctor, tell us what your examination, X-rays and findings disclosed, and you may, of course, look at your report and state those things.
A. This man gave a history that on January 23rd, 1958,

while he was on a box-car in the Yards, Norfolk and Western Yards, he was hurt. His history was vague, but he said he thought that he was knocked off of the top of the car and fell and struck against the bumper. The one thing that he seemed sure of, that he struck the left side of his pelvis, and that it hurt his back and his left leg. He stated that he was taken to Bluefield Sanitarium where he was treated and later was seen at Lewis-Gale Hospital; that ever since the injury he had had severe pain in his low back and down the left leg.

In going into the past history, he stated that he had had no previous difficulty with his back, that he had worked regularly as a brakeman since his employment in 1951, and [fol. 237] that prior to his employment as a brakeman he worked in the mines doing heavy work, with heavy lifting, and without any back symptoms.

He stated that the pain in his back and leg were so severe that he frequently was unable to sleep.

On examination, he was very apprehensive of everything that we did. He was very protective in his movements. By that, I mean that he was very careful when he got up, and very careful when he sat down, and when he moved in any direction. And he walked with a left hip limp, holding the left hip somewhat bent, and using a cane.

All motion, all active motion, in his spine was very sharply limited in every direction. On jugular compression—that is, when we put—compress the veins in the neck—he stated that it caused increased numbness in his left leg.

Straight-leg raising on the left side was thirty degrees. That is, with him on his back, when I attempted to raise the leg from the table with the knee straight, he complained of pain at thirty degrees, while on the right it could be—the right leg could be raised to seventy degrees.

He complained of severe pain at the lumbosacral juncture. That is the point here (indicating) where the lumbar spine is attached to the sacrum. It's an essential part of the pelvis. He complained of pain in that area when [fol. 238] his hips were manipulated to the extreme in any direction.

On checking for sensation, he apparently had interference with sensation throughout the entire left leg.

On looking at him, the normal lumbar lordosis, or the

lower curve in the back was very much more marked than normal. As you see it here, this is what we speak of as the lumbar lordosis (indicating on skeleton), this curve just above the pelvis. And his was very much more than usual. What we speak of as a sway-back. And there was the general appearance that the whole spine was slid forward with reference to the pelvis.

His lumbar muscles were held in constant spasm. That is, whether he was standing, or lying down on his face, or on his back, these muscles in the lower part of the spine were held tight, which we consider to be a protective mechanism to prevent pain.

There was tenderness over the third, fourth, and fifth spinous processes of the lumbar vertebrae. These last three spines, they are the points that you feel under the skin in the midline.

On percussion, or striking, over the sacrum here with the ball of the hand, he complained of severe pain at the lumbosacral juncture.

The knee jerk—no; I beg your pardon. The Achilles [fol. 239] reflex—that is, the heel cord reflex—on the left side was decreased as compared to the right. On striking the Achilles tendon, or the heel cord, you get a bending of the foot downward. It was less marked on the left than on the right.

There was complete limitation of motion in the lumbar spine on trying to manipulate it as he lay on the table, with very marked muscle spasm and pain.

I then X-rayed his spine and found that the body of the fifth lumbar vertebra, the lowest one just above the pelvis, was slipped forward on the sacrum about one half of its diameter. The disk space between that body and the sacrum was almost completely obliterated, allowing the bone to be essentially down on the sacrum. The pedicles of the fifth —the parts here (indicating on skeleton) you can see that attaches this—we speak of this as the body, to the posterior part of the vertebra is the pedicle. It's the arch that makes the arch for the spinal canal. These pedicles were apparently still in good condition.

That completes the examination part.

Q. 54. What was your conclusion, doctor, from your examination and X-rays?

A. From the history, the examination, and the X-rays, I considered without a question this man had a severe spondylolisthesis, which means a slipping forward of one vertebral body on another; and considering the history [fol. 240] and the findings, I considered that it was traumatic in origin, that it was—that is, due to injury.

Q. 55. Doctor, even assuming that he had this spondylolisthesis prior to the time that he claims he was injured, do people ever have these conditions which are dormant, non-symptom, and non-disabling?

A. It is entirely possible to have this anatomical deformity—that is, one vertebra slipped forward on the other—without any symptoms for many years, or throughout a long life. And when we say, "traumatic in origin," we accept the fact that the actual condition may have been present before the injury; but we mean by "traumatic," that the disabling part of it came on as a result of injury.

Q. 56. Yes, sir.

A. Because probably none of them are completely caused—that is, the mechanical thing is caused—by an injury.

Q. 57. Yes, sir. In other words, then, I understand you to say that people do have these conditions which are non-disabling and are non-symptom——

A. Non-symptomatic.

Q. 58. (Continuing)—non-symptomatic; in other words, it doesn't give them any trouble, or it doesn't give them any pain, and they are still able to work?

A. That is true. They don't even know they have it. [fols. 241-246] And many of these are found just incidentally in some other X-ray examination.

Q. 59. Then, doctor, has it been your experience and teaching, as a medical man, that an injury, even though slight, can aggravate that condition and bring them into play and make that condition a non-disabling—I mean a disabling condition?

A. That is true. These conditions become painful and disabling sometimes with little or even no known injury, or they may become painful after severe injury, in which case we speak of them as traumatic in origin.

. . . . . .

[fol. 247] A. (Continuing) and, as you will see, this body, instead of being in line with the ones above, this fifth is slipped that much forward on the sacrum.

. . . . . .

The witness thereupon removed the X-ray from the radiograph illuminator and placed another X-ray on the radiograph illuminator.

. . . . . .

[fol. 248] So, as you will see, the fifth is slipped forward on the sacrum approximately half its width with almost complete loss of the intervertebral disk space.

Q. 90. Doctor, you said that you found, as I recall, root pain down the left leg; is that true?

A. Yes, sir. He complained of root pain down the left leg.

Q. 91. Did you make a test to determine if that was true?

A. No; you can't. Pain is subjective.

Q. 92. Subjective. Would that be one of the natural attributes to what you did find?

A. It would be consistent with the things that we found; [fols. 249-250] not necessarily true, though.

. . . . . .

Q. 94. Doctor, from what you saw on your X-rays and on your examination, in your opinion, are these nerves that come down the spinal column and out there at the fifth lumbar vertebra on the sacrum, are they involved in Carl Still?

A. I consider that they are.

. . . . . .

Q. 96. Under the condition you found there with reference to the fifth lumbar vertebra on the sacrum, which has been displaced forward, does that also displace the natural course of those nerves that came down through there?

A. It does.

. . . . . .

[fols. 251-252] Q. 102. Doctor, you were talking about the lumbar lordosis, is that right?

A. Yes, sir.

Q. 103. Just what did you mean by that?

A. I mean this normal low curve in the spine, which is true of all normal spines. With him, it was much more marked than usual, or, as we describe it, a sway-back, because the trunk sits further forward on his pelvis than normal.

Q. 104. Does that have anything to do with his locomotion—walking, stooping, bending, squatting?

A. That of itself does not because all of these spondylolisthesis cases that have no symptoms have the same exaggeration of lordosis. It is one of the things that on examination makes you think they probably have a spondylolisthesis before you see X-rays.

. . . . . .

[fol. 253] Q. 116. Doctor, in your opinion, from what you found on your examination and from your X-rays, is Carl [fol. 254] Still, or has he been, and if he's the same now, is he suffering any pain and discomfort from that?

A. At the time I saw him, I considered that he was having pain and that he was disabled so far as any work was concerned.

. . . . . .

Q. 118. In your opinion, at the time you examined him, could he work as a yard brakeman?

A. No.

Q. 119. If he's in that same condition now, in your opinion, could he now work as a yard brakeman?

A. No.

Q. 120. In your opinion, could he ever work as a yard brakeman in the condition he is in now?

A. Not in the condition he is now.

Q. 121. In your opinion, could he have worked as a yard brakeman if he had a non-symptom—or asymptomatic or non-disabling spondylolisthesis?

A. It is entirely possible for him with a spondylolisthesis that was giving no symptoms whatever to go on and do very heavy work. I have seen it repeatedly.

Q. 122. That's a common thing, is it?

A. Yes.

Q. 123. But do you say that a slight or a great injury, [fol. 255] either one, or both, can make them active?

A. That is true.

Q. 124. And make them disabling?

A. Yes.

Q. 125. Where they have been non-disabling?

A. Yes, sir.

Q. 126. That's true even though they are of congenital origin?

A. That is true.

Q. 127. That is, that they come on a person gradually during life, is that right?

A. Sometimes the symptoms come on gradually; sometimes they come on suddenly. The actual slipping, I don't think, ever comes on gradually. That is either present or it may have some of the slipping suddenly in an injury.

Q. 128. Yes, sir. Now, doctor, if he remains in the condition which you found him in, will he be permanently and totally disabled from manual labor?

A. I consider that he would.

Q. 129. In your opinion, at the time you examined him, and from your X-rays and findings, was he able to do any manual labor?

A. No, sir.

Q. 130. If he doesn't have an operation, which we will come to in a few minutes, and if he stays in this present [fol. 256] condition, in your opinion, will he be permanently and totally disabled for life from performing manual labor?

A. He probably will.

Q. 131. Now, doctor, is there some operation that might help him?

A. There is.

Q. 132. Will you explain to His Honor and to the ladies and gentlemen on the jury what operation you think might help him?

A. The operative procedure that would be necessary in this case is the combined neurosurgical and orthopedic procedure. First of all, the nerve roots, as they come out between the fifth lumbar and the sacrum, would be exposed by the neurosurgeon and freed up of adhesions and anything that's pressing on them to get rid of the pain that he gets in that area. Then your orthopedic man would

carry out a bone graft procedure to bone graft the fourth and perhaps the remaining part of the fifth to the sacrum. In some of these cases, that part of the fifth has to the taken out and thrown away—I mean discarded, and if that is true, the bone graft would be a bridging across from the fourth lumbar down to the sacrum, with the idea of eliminating all motion from four to the sacrum, making it solid as one bone, which should relieve the pain and make it possible for him to do work.

. . . . . .

[fols. 257-260] Q. 135. In other words, even though the operation were successful, I take it, then, that it is your opinion that he wouldn't be suitable for a yard brakeman?

A. Not for a yard brakeman.

. . . . . .

[fol. 261] Q. 161. Now, doctor, I am going to ask you a hypothetical question based on some facts, which we will show in evidence in this case. And here, in substance, is that question:

Assuming that Carl Still did go to work as a yard brakesman for the Norfolk and Western Railway Company in its Bluefield, West Virginia, Yards on July 24th, 1951; that from July 24th, 1951, he worked fairly regularly as a yard brakeman in the Bluefield Yards; that his duties required him to get on and off of moving trains, to ride on top of moving trains, to get on and off of moving cars, and to ride on moving cars—that is, climb up to the top; now, assuming that during that period from July 24th, 1951, up until January 23rd, 1958, with the exception of about a year, and that he did work, as I say, regularly and performed his duties in a successful and reasonable manner as a yard brakesman; and further assuming that on the [fol. 262] night of January 23rd, 1958, he was standing up on a platform on the end of a coal car directing it west down the track, a picture of which I show you, introduced as Plaintiff's Exhibit No. 2—he was standing on this platform; this car was going down the track in a westward direction; that a train, the west end of a train, while it was going down the track, with his back to it, came up and struck and recoupled with this car, or one like it, not this one,

causing him to be thrown forward against the rim, top rim and top part of that car, his life hip, left side, and left leg striking there; now, assuming that up to that time he had not had any discomfort or had any trouble doing his duties as a yard brakesman from the time he started; assuming further that immediately after he was knocked against this car that he felt severe pain in his abdomen, his low back, his left hip, and his left leg, and that that condition has continued since that time until now; in your opinion, at that time and at the time he claims he was injured, would you say that he had a non-disabling spondylolisthesis prior to that time?

A. I would certainly consider that under those circumstances up to that time his spondylolisthesis was not disabling, for he could not have carried out that work with a symptomatic spondylolisthesis.

Q. 162. In other words, doctor, if he had had what you found him to have when you examined him, could he have done that work?

[fol. 263] A. I consider that he could not.

Q. 163. And, certainly, he can't do it now?

A. That's true, if he's the same he was then.

. . . . . .

Q. 164. Doctor, one other question and I am through. Now, assuming that he did have this condition, as I have stated in the previous question, and assuming that he was knocked forward there and hit the car with his left side, his left hip, and left leg, in your opinion, could that have caused his present condition?

A. I would consider that in that situation the injury described caused the spondylolisthesis to become symptomatic and remain so. In other words, it became active and symptomatic.

. . . . . .

Cross-examination.

By Mr. Sanders, Sr.:

Q. 1. When did you examine Carl Still, doctor?

[fol. 264] A. It was on May 15, 1959.

Q. 2. Is that the only time you have ever seen him?

A. That's the only time I have seen him until today.

Q. 3. How long did it take you to examine him?

A. Probably an hour or an hour and a half.

Q. 4. Why did you examine him?

A. At the request of Mr. Burton.

Q. 5. At that time, I believe you knew that he was contemplating bringing a suit against the Norfolk and Western?

A. I did.

Q. 6. And you knew that your testimony was being taken for the purpose of being used in that litigation?

A. That is true.

Q. 7. You didn't examine him for the purpose of treating him, did you?

A. Not primarily; but, as always, I refuse to go through without making a recommendation as to what should be done.

Q. 8. But after examining him, you never treated him?

A. I did not.

Q. 9. You saw him only one time and you have never treated him?

A. That is true.

Q. 10. You had never seen him before that time?

[fol. 265] A. That is true.

Q. 11. And you knew he had a case in litigation that he was preparing to try?

A. That is true.

Q. 12. And that your testimony was to be used in that litigation?

A. That is true.

Q. 13. But, then, you did make a recommendation to Mr. Still at the conclusion of your examination?

A. I did.

Q. 14. I believe you advised that he have surgery on his back?

A. I advised very strongly that he have surgery.

Q. 15. You felt like that was advisible and could be safely done and should be done?

A. I did.

Q. 16. And isn't it a fact that Still told you that other doctors that had previously examined him had strongly advised that he have surgery?

A. That is true.

Q. 17. And you felt and now feel that that surgery, which you have described, can be performed with safety and it should be done?

A. I feel that it should by all means, and that there would [fol. 266] be no more chance than one takes in any operative procedure.

Q. 18. And it should have been done long ago, shouldn't it?

A. Certainly.

Q. 19. You have done a great many of those operations yourself, haven't you, Dr. Hoover?

A. Many of them.

Q. 20. And you think that when this operation is done that that will—he will get rid of this pain, whatever pain he should have?

A. Yes, sir.

Q. 21. And that he can do certain types of manual labor?

A. Yes, sir.

Q. 22. He can work and earn a living?

A. Yes, sir.

* * * * * * *

Q. 25. Now, of course, this condition that you found—I believe your diagnosis here was that he had a very severe spondylolisthesis?

[fols. 267-268] I did, yes, sir. he had spondylolisthesis.

Q. 26. And you have described that as a displacement forward on the sacrum of the fifth lumbar vertebra?

A. Yes, sir.

Q. 27. About one half the diameter of the fifth lumbar vertebra?

A. Yes, sir.

* * * * * * *

[fol. 269] Q. 42. If it caused no pain and I was able and wanted to work, you would tell me tc go right ahead and it was safe to work, wouldn't you?

[fol. 270] A. No. If I found one of those, in some concerns that I have seen cases on pre-employment examination, I would advise against that man doing the type work

that he proposed to do although he had not a symptom at all.

Q. 43. In many other cases, though, men do go through life doing hard manual labor with their spines in just this condition and it doesn't bother them at all?

A. The hardest type of manual labor; not infrequently.

Q. 44. Now, of course, doctor, therefore, when you make an examination in a case of this kind, it's extremely important to get a truthful history, isn't it?

A. That's true.

Q. 45. And, of course, when you are examining a man for a condition like this, one of the first question you ask him is if he ever had any previous back disability, isn't it?

A. That's true.

Q. 46. You would want to know about that?

A. Certainly.

Q. 47. It is highly important and it enters into your findings, doesn't it?

A. It certainly does.

Q. 48. Now, in this case, you asked Mr. Still, of course, if he had had any previous back trouble or back disability, didn't you?

[fols. 271-272] A. I did.

Q. 49. What did he tell you?

A. That he had not.

Q. 50. He had no previous back trouble or disability whatever?

A. Whatsoever.

Q. 51. During his entire life?

A. Yes, sir.

Q. 52. And you relied on that——

A. I did.

Q. 53. (Continuing)—as correct, and that, of course, entered into your findings, didn't it?

A. It did.

* * * * * * *

[fol. 273] Q. 64. Then, he did state to you that he was knocked off of this car and fell down on the bumpers, couplers, striking his back. Of course, you relied on that history considerably, too?

A. Surely.

Q. 65. Because if a man had been knocked off of the brake step on a coal car and had fallen all the way down and struck his back on the couplers, you know that would in itself be sufficient to produce a serious injury. So that entered into your findings, too?

A. It did.

Q. 66. Now, I believe he also told you that he got numb all over?

A. He gave the history that at times he would be numb all over.

Q. 67. Yes. Well, did you find anything about his physical condition to explain that statement?

A. No, sir.

Q. 68. Anything that could possibly explain why he [fol. 274] would get numb all over?

A. No physical basis for it at all.

• • • • • • •

Q. 71. Now, doctor, pain, you say, is a subjective thing?

A. It is.

Q. 72. Largely, isn't it?

A. It is.

Q. 73. And when examining your patients and asking them about the history, you rely a good deal on what your patients tell you about the pain and discomfort they feel?

A. You have to.

Q. 74. You have to do that; and you did in this case rely a great deal on what Mr. Still told you about his pain and discomfort?

A. That's so.

• • • • • • •

[fols. 275-276] Q. 76. You didn't know, then, how long that condition had been present?

A. There was no way at all for me to arrive at a thing of that type.

Q. 77. You say he said he fell down, striking on the left trochanteric area. What area is that, doctor?

A. That is on the left side of the pelvis over the bony prominence of the femur (indicating on himself).

Q. 78. I believe he told you he had not been sick until the injury occurred, never been sick?

A. That is his statement.

. . . . . .

[fol. 277] Cross-examination.

By Mr. Sanders, Sr. (Continuing):

Q. 79. Doctor, you stated on a pre-employment examination, you would advise against this man doing braking work as a yard brakeman?

A. I would.

Q. 80. And you would advise against anyone with a spine in this condition working as a yard brakeman?

A. I would.

Re-direct examination.

By Mr. Walter G. Burton:

[fol. 278] Q. 1. Your answer is based on his now present condition?

A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic one even in the ordinary activities of braking, not with any accident at all.

Q. 2. Doctor, what you mean, as I understand you, if you had seen this man and examined him, and his condition had been the same when you examined him, and you found it the same, and you were examining him for employment, you would say he wasn't proper for a brakesman?

A. No, the thing I am stating——

Q. 3. I don't catch it. I want it plain.

A. The thing I am stating is this: that if in a pre-employment examination of an individual who is having no symptoms, if I saw X-rays like this, I would advise against employing that man as a yard brakeman because of the danger of getting a painful back out of it.

Q. 4. I understand you. Thank you.

A. And that has happened a number of times.

. . . . . .

[fols. 279-281] Q. 6. That's right. Now, doctor, Mr. Sanders asked you some questions about what you said in your deposition, and, in fairness to you, I am calling your attention to page forty. Will you read the question here—start there (indicating) and read down to there (indicating)? That's on forty.

A. Question: "Did he claim that he struck his left side?" Answer: "That is one of the things that he was indefinite about—the injury—except that he said that he struck on his left side." Then the question: "You mean he was indefinite about the place where he was actually injured?" Answer: "Just where he was injured or just how he fell." Question: "Yes; but he did state he was knocked off a freight car?" "Yes."

Re-cross-examination.

By Mr. Sanders, Sr.:

Q. 1. Continue on, doctor.

A. All right. Question: "Falling between the cars and injuring his leg and hip?" "Yes; in fact, he did not mention injuring his back. This was all hypothetical to him."

* * * * * * *

[fol. 282] R. W. UMBERGER, called as an adverse witness for examination by counsel for the plaintiff out of the presence of the jury, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Walter G. Burton:

* * * * * * *

[fols. 283-284] Q. 3. Mr. Umberger, were you working for the Norfolk and Western Railway Company on and prior to January 23rd, '58?

A. On and prior, yes, sir.

Q. 4. You do work for them now?

A. Yes, sir.

Q. 5. What is your official position with them?

A. Gang foreman, Car Department.

Q. 6. Is it your business to inspect defective cars?

A. Yes, sir.

. . . . . .

[fol. 285] Q. 22. All right. What does that record there reveal, or show, was done with the car No. 11878 that Carl Still was on at the time he claims he was injured?

A. This record here shows that this car was inspected and was shopped for hood covers, and it also explains that [fols. 286-289] they tagged the car to the shop track.

Q. 26. The bottom of that car was deteriorated and loose?

A. Yes, sir.

Q. 27. Wouldn't—wasn't fit for service?

A. That's right.

Q. 28. And how old was that car?

A. I would say approximately thirty years old.

Q. 29. And do your records further show that that car was sent to Portsmouth, Ohio, where it was dismantled because it wasn't in good enough condition to repair?

A. Yes, sir.

. . . . . .

[fol. 290] Q. 50. And it was in such condition that, since the bottom of it was bad, you determined that it wasn't fit for service and you junked it, is that right?

A. Sent it to Portsmouth for dismantling.

Q. 51. That is junking, isn't it?

A. Well, it is to be torn down.

Q. 52. Yes. Now, where—is the hood the only thing, or the bottom of that car, that you found wrong with it?

A. No, sir.

Q. 53. Well, tell us what you found wrong with that car.

A. All right. When we send one to Portsmouth, we not only consider that hood, but we look at the doors, which have a tendency to eat up or rot out at the bottom due to acid in coals, and things like that, and also in the seams of your side sheets.

Q. 54. Now, what was wrong with the seams in the side sheets?

A. Well, you would say that they were in a deteriorated condition.

Q. 55. That was such a defective car, then, I understand, that you had it dismantled?

[fols. 291-297] A. Yes, sir.

Q. 56. Did you find anything else wrong with that car?

A. No, sir.

Q. 57. That's all you found?

A. That's right.

• • • • • • •

[fol. 298] Q. 99. Before you could send this car to Columbus, Ohio, to have it dismantled, you said, as I understood you—and if I didn't understand you right, you correct me, because I don't want to misquote you—that you had to fix the journal boxes on the car?

A. In other words, oil the journals and see that you would have enough oil in them, lubrication.

Q. 100. You did lubricate the journal boxes?

A. Yes, sir.

Q. 101. What else did you do to get it to Portsmouth?

A. We always test the air brakes.

Q. 102. Did you find anything wrong with the air brakes?

A. No, sir.

• • • • • • •

[fol. 299] Dr. B. R. Kinter, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter G. Burton:

• • • • • • •

[fol. 300] By Mr. Walter G. Burton (Continuing):

Q. 2. What is your name, please, sir?

A. B. R. Kinter.

• • • • • • •

Q. 4. What is your position or profession?

A. I am an osteopathic physician.

Q. 6. How long have you been licensed as a doctor in West Virginia?

A. About twenty-four years. I guess—twenty-four years.

. . . . . .

Q. 8. Are you a graduate of any accredited school of osteopathy?

A. Yes, sir.

. . . . . .

[fol. 301] Q. 11. When did you graduate?

A. 1930.

. . . . . .

[fol. 302] Q. 23. How long have you operated the Bluefield Osteopathic Clinic?

A. I built it in 1939.

. . . . . .

[fol. 303] Q. 29. Do you know the plaintiff in this case, Carl Still?

A. Yes, I knew Carl Still.

Q. 30. Did you have an occasion to examine him on February 3rd, 1959?

A. I did.

. . . . . .

Q. 32. Did you also—

. . . . . .

examine him subsequent to that time, and, if so, just the dates you examined him subsequent to February 3rd, 1959?

[fol. 304] The witness thereupon referred to his records.

A. I saw him first on February 3rd, and I re-examined him on June 29th. I saw him again on July 15th and again on September 30th.

. . . . . .

Q. 38. When did you take your X-ray pictures, doctor?

A. I took the first set on February 3rd, the second ones for re-check in July. I took some more X-rays on the thirtieth day of September.

. . . . . .

[fol. 305] Q. 46. Doctor, from your examination of Carl Still and from your X-ray pictures, which we will ask you to show and demonstrate to this jury in a few minutes, what did your examination reveal, if anything, was wrong [fol. 306] with Carl Still's back?

A. My examination showed that he had an extreme condition of what is known as a spondylolisthesis—that's a slipping forward of the fifth lumbar vertebra on the body of the sacrum—and that he possibly had a partial, or small, compression fracture and partial dislocation, which—in other words, this fifth lumbar, the last vertebra down, had slipped so far forward that I considered it a dislocation.

. . . . . .

Q. 48. There is a pointer there right in the box, Dr. Kinter. Now, you want to turn it around so that the jury can see it, please, sir.

A. Yes, sir. Now, what is involved in this case, this last vertebra down is your fifth lumbar vertebra. There are five vertebrae; that's the reason we call it the fifth. It forms a junction with the body, the upper edge of this solid bone known as the sacrum, and it has a base [fol. 307] that it rides on.

Now, in between the upper margin of the sacral bone—the sacrum, this big bone that forms the bottom—lays the disk between—what is known as the disk between L-5, or fifth lumbar, and S-1, which is your first sacral segment. The sacral segments are fused, but you can still see the rudiments; you can still see that they represent the same thing as the bones do higher up.

Now, this vertebra here, as you notice, normally has a slight angulation, and this bone right here, this last one with the wings, slid forward approximately half the width of its body until it is extending out into the pelvic cavity, carrying with it the ligaments and structures that normally

would bind it to the sacrum and to the fourth lumbar vertebra above. When this vertebra slid forward, as you can see, due to the fact that this angulation is down this way, it produces a gapping, and where the weight-bearing of the human body should be on this area, now the weight-bearing—but, anyway, the weight-bearing is sitting out into the pelvis, which—I am exaggerating, of course—does this to him (demonstrating). It throws him out of balance.

Now, there is a normal lordotic curve compensated for up here, which gives you your flexibility of motion.

These disks that lay in between each of the vertebrae [fol. 308] are of soft cartilaginous materials, which serve as hydraulic shock absorbers. In the center is a jelly-like mass. The outer edges of them are firmer. And when this is carried forward, we lost, due to absorption, or irritation, or possibly due to the fact that blood infiltrated in injury —I don't know any more than anyone does what happened because Carl Still has never been opened up surgically for examination—but something has happened, and we have lost this disk space between the last lumbar vertebra and the sacrum, and this vertebra is extending out into the pelvis carrying with it all the structures.

Now, other things happen when that vertebra comes forward; but I believe that answers the question you asked me at that time.

• • • • • • •

[fol. 309] Q. 54. Will you take those X-rays and place them, one at a time, in this box, which is a viewing box.

A. • • •

[fol. 310] In other words, that vertebra is slid forward off of this sacral plane approximately half the width of the body.

• • • • • • •

Now, the spinal cord has to make a turn to come out like [fols. 311-312] this in order to get out of that vertebra where it is slid forward because here it has to come out in a lot of filaments that come out here, come out of these exits, as you see them here. Now, when this is forward, it just puts a pull on there, and then, of course, this strain,

each time that he walks and steps, with no additional weight-bearing whatsoever, he is spraining his own back.

• • • • • • •

[fol. 313] Q. 56. Now, doctor, you have just placed a third film in the viewing box, is that true?
[fol. 314] A. I did.

• • • • • • •

Q. 58. What date?

A. 2-3—February 3rd, 1959.

Q. 59. Go ahead, sir.

A. Trying to concentrate and find out what happened in the back part of this vertebra, whether or not we were dealing with just a slipping down off the pedicles or whether we had a complete dislocation, and that's when we found we had a complete separation in here. Do you see it?

Q. 60. Point it out to the jury, that separation.

A. The separation of the posterior margin showing that this is a dislocation and not a slipping; it carried everything with it. It also shows this, that we are now aware—you have here in between each of these vertebrae a disk space—you have lost it. You don't have that area.

Q. 61. Does he have any disk now, doctor, between the sacrum and the bottom of the fifth lumbar vertebra?

A. If he does, it is minimal. It is probably absorbed. And this picture will show that the body of the fifth lumbar vertebra—bony structure is now riding against bony structure—of the base or upper margin of the sacrum.

[fol. 315] Q. 62. Do you mean by that, as I understand, doctor, that he has no spring between the fifth lumbar vertebra and the sacrum, is that right?

A. No, he has lost that shock absorber.

• • • • • • •

Q. 65. By reason alone or in conjunction with the displacement of the vertebra on the sacrum, and the shock absorber, or disk, the two together, or one alone, he has lost the motion?

A. He has lost all of it. He has lost the motion because

the articulation is not in position. In other words, he has got a dislocation. If you brought it back here, he would still have no motion because he has lost the disk space. He's riding bone against bone.

Q. 66. Now, what effect does that have on his locomotion [fol. 316] and his walk, doctor?

A. Well, it limits his bending. He can't bend. You can't —changes his gait. Gives him pressure pain. These nerve roots that belong way back here are now being dragged way forward.

Q. 67. What effect does that have?

A. Out of the last four vertebrae, sometimes the fifth, maybe even up in the first thoracic, you have a plexus of nerves coming out from each one of these areas, just like my fingers would be bringing them out, forming my wrist, forming this great sciatic nerve, which supplies the area, the abdomen, the pelvis, the legs; and whenever you shut off circulation in here, you get a pull, or pressure, on them, you get two things: You get lack of locomotion, or lack of power; you—on the sensory side, the posterior nerve roots being afferent nerves, or nerves of sensation, that gives you pain. You get atrophy because when you lose your nerve sensations and you impede the circulation, and in this same area is your arterial supply, you just lose the use of your leg. You get smaller.

Q. 68. Doctor, there is a condition you pointed out on the X-ray, and from your examination, as the nerves which come ou. down through the spinal cord and pass through the fifth lumbar vertebra; in your opinion have they been affected and are they now affected?

[fol. 317] A. They are.

* * * * * * *

Q. 69. Doctor, you have another X-ray picture there?

A. Yes, sir. This picture was taken and dated 7-15-59.

* * * * * * *

Q. 71. Now, doctor, tell us what that picture reveals, [fol. 318] please, sir.

A. * * *

The thing that's remarkable in this picture is the fact

that the vertebra is still sitting where it was. You are beginning to get arthritic spur development on the posterior end. Due to the fact that it is shoving here, you begin to see arthritic infiltration on the upper border and on the lower border of the fourth. It is still in the same relative forward displaced position.

• • • • • • •

Q. 74. What effect will that have upon him, doctor, if any, in your opinion?

[fol. 319] A. That's the reason for putting the support on—to limit that irritation, because there is where you get the additional pressure on your posterior nerve roots, your efferent and afferent nerves, which mean nerves coming out and nerves going into the spine, closing off of the circulation, which produces an atrophy, or a diminution, of the muscles and function of the structures below the level that these nerves supply.

Q. 75. Doctor, I want to ask you one question that I think of now, which I will get to in a minute, but I am digressing just a bit. If there is an operation on this man, in your opinion, can they ever, even with an operation, and even the operation, assuming it to be as successful as it could be expected to be, can they ever bring that bone back there to its natural position?

A. I don't think so. It's been here too long. This bone is adhered fast. To go down in there and actually dissect and take that bone loose, you have got to go through all these nerve structures. Your chance of improvement is greatly offset, and probably more than offset, by your danger of cord damage in trying to go under there with an elevator and pull it up. It would not be, I don't believe, good surgical procedure at this time to attempt to restore that vertebra back there.

• • • • • • •

[fol. 320] Q. 77. Now, doctor, do you have another film?

A. I have——

Q. 78. That's X-ray.

A. (Continuing)—one here, now, that is dated 9-30-59.

• • • • • • •

[fol. 321] Q. 85. In other words, I requested you to take his ribs on the right side last week, is that right?

A. Yes, sir.

. . . . . .

[fol. 322] Q. 88. All right; tell us what you found.

A. As far as I am concerned, in looking at this picture, these ribs have no significant changes. I mean, they are slightly depressed and the angles here are bent, but they have nothing to do with this situation that we are talking about.

Something that did turn up in this picture is this chronic contraction that I was talking about, and I can show you the comparison on 7-15, a film made of Carl Still—this one is dated 7-15—in which this muscle contraction had not began to pull, and scar tissue had not began to pull down and involve this right sacroiliac; and since that time you see the angle of this back—I want you to look—you can have that picture, too, as an exhibit if you wish it. I want you to notice what is going on down in here now.

Q. 89. What's going on, doctor?

A. It is tilted and tipped off there being bound down by a mass of adhesions and giving him a curve which you can see in his back on physical examination. This is what I am talking about when this puckering begins to occur.

Q. 90. What do you mean by "adhesion," doctor? You used that word.

A. Mass of scar tissue.

Q. 91. And what effect does that have upon him?

[fols. 323-325] A. Binds him in, pulls him down. It decreases his body bending, his activity. He just doesn't have any back in here to use any more, that's all.

Q. 92. So, you can say from the first time that you examined him on February 3rd, 1959, and from your X-ray pictures, and the picture now which you are talking about, which was taken on—

A. 9-30-59.

Q. 93. (Continuing)—September 30th, 1959, that he is undergoing a change, is that right?

A. He is.

Q. 94. Is that change for better or worse as far as he is concerned?

A. It's for worse from the standpoint of limiting his mobility, and he is able to get about, and possibly increasing pressure in this area here where the tilting is going on.

• • • • • • •

[fol. 326] Q. 99. Doctor, can a disk such as you say now has disappeared, or substantially disappeared, between the bottom of the fifth vertebra and the sacrum, can that ever be replaced?

A. No, sir.

Q. 100. Doctor, from your examination on these occasions which you have examined Carl Still and took these X-ray pictures, did you find any paralysis or paresis of the left hip or left leg, or any part of it?

• • • • • • •

A. Yes, there is a parasthesia present throughout the entire left leg.

• • • • • • •

Q. 103. Where did you find it?

A. It's practically throughout the entire left leg.

• • • • • • •

[fols. 327-328] Q. 106. Now, in your opinion, has that sciatic nerve been affected any in Carl Still's body by reason of the condition you have described and which you found?

• • • • • • •

[fol. 329] Q. 111. Doctor, in your opinion, is Carl Still having any pain and discomfort in his back from what your examination and X-ray films reveal?

A. He is.

• • • • • • •

[fol. 330] Q. 119. You now say, in your opinion, he is suffering it in both legs?

A. Yes, sir.

• • • • • • •

[fol. 331] Q. 120. Doctor, from the time you examined him, in your opinion, has he been suffering pain, as a result of your findings, since you examined him?

A. Yes, he has.

Q. 121. If he had had substantially the same condition which you found when you examined him on February 3rd, 1959, the first time, if he has had that condition since February 23rd, 1958—January—pardon me—23rd, 1958, would you say that from the period of January 23rd, 1958, until the time you examined him on February 3rd, 1959, that he had been suffering pain and discomfort?

A. Assuming that this injury that I saw in February of '59——

Q. 122. Yes.

A. (Continuing)—occurred a year previous, I would say he had pain symptoms ever since it happened in '58.

Q. 123. In your opinion, from your examination and your X-rays, will he continue to suffer pain and discomfort during the remainder of his natural life?

A. I would say that he will have pain and discomfort [fol. 332] the rest of his life.

Q. 124. In your opinion, has he been able to work as a yard brakeman or do any manual labor, assuming that he has had this condition since the night of January 23rd, 1958?

A. He is totally disabled for any work.

Q. 125. You mean he is permanently and totally disabled for life from performing any manual labor?

A. I would think so. When you speak of manual labor, you are talking about physical labor?

Q. 126. Yes, sir.

A. No, he can't do physical labor.

Q. 127. Could he work in the mines?

A. No, sir.

Q. 128. Could he work with a pick and shovel?

A. No, sir.

Q. 129. Could he work as a yard brakeman on the Railroad?

A. No.

Q. 130. Could he do any work which required lifting, stooping, bending, or that sort of thing?

A. No, he can't.

Q. 131. In your opinion, even assuming that he has an operation in the future and that that operation would be as successful as it could be, in your opinion, will he ever be able to go back as a brakeman for the Norfolk and Western Railway Company or any other company?

A. No, sir.

[fol. 333] Q. 132. Doctor, even if he had that operation and it was as successful as it could be expected to be, in your opinion, would he be able to go back and do duties as a yard brakeman or manual labor?

A. No, sir, he couldn't—he can't do it.

Q. 133. Doctor, when you examined Carl Still on these occasions, did you find any muscle spasms at any place in his body?

A. Yes; the whole lumbar area was in spasm.

. . . . . .

[fol. 334] Q. 138. In other words, you think that if he would have the operation and it were successful, he might get rid of some of this pain; is that what I understand you to say?

A. He might, yes, sir. I think he would get rid of some of it.

Q. 139. Is there any absolute way to tell whether he would or would not, doctor, at that time get rid of that pain, even if he had the operation?

A. No, there isn't.

Q. 140. Did you detect from your examination of this man whether he had any limp or not?

A. Yes, he has a definite limp.

Q. 141. What causes that limp, doctor?

A. Improper function of his low back, as I pointed out before; lack of sensation in the leg; his nutrition of the muscles is disturbed, and the nerve function is disturbed from the level of the lumbar plexus.

Q. 142. Dr. Kinter, do people have this congenital spondylolisthesis?

A. A certain percentage of people have a congenital spondylolisthesis, yes, sir.

[fol. 335] Q. 143. Doctor, from your knowledge as a medical man, are some of those cases non-painful and non-disabling?

A. Well, spondylolisthesis, when it's present in a minor degree, is usually asymptomatic and not painful until something comes along to disturb it—sprain it, strain it, overwork it—then it could become symptomatic.

Q. 144. Is it true that some of them are non-disabling?

A. Oh, yes; yes, that's true.

Q. 145. Can trauma or injury, and I use them in the same sense, aggravate them and bring them into being disabling?

A. Yes, sir, it can.

Q. 146. Doctor, assuming, now, that Carl Still did have a pre-existing spondylolisthesis, but that he went to work as a brakesman for the N. and W. Railway Company on July 24th, 1951; that he worked as a brakesman for the N. and W. Railway Company from July 24th, 1951, fairly regularly when he had work, except about a year, during the period, up until the night of January 23rd, 1958; now, assuming that he was able to perform his duties as a brakesman in a satisfactory manner, in your opinion, from what you have found from your examinations and X-rays, if his back had been in the condition which you found it in, could he have performed those duties prior to and on the night, before he claims he was injured, of January 23rd, 1958? [fol. 336] A. If he had the condition that I found him in in February of '59, he couldn't work at anything.

. . . . . .

Q. 149. Now, assuming, doctor, that he had the condition which you found him to have when you examined him, could he have worked as a yard brakeman and performed his duties as a yard brakeman prior to the night of January 23rd, 1958?

A. No.

Q. 150. Will you speak out?

A. No. The condition I found him in, he couldn't climb. He can't even get on and off an examining table by himself.

Q. 151. Now, doctor, assuming that for at least a period of five and a half years, up until January 23rd, 1958, that he did perform his duties in a successful manner as a yard brakeman for the N. and W. Railroad Company, and on that night he claims he was thrown with his left hip and left side against the top of a steel coal car; that he then

and there immediately had pain through his back, stomach, [fol. 337] left hip, and left leg; in your opinion, did he—assuming those facts are true—in your opinion, did he there receive an injury which brought into being the condition which you now find him to be in?

A. Assuming that this is true, that he was working——

Q. 152. Yes, sir.

A. (Continuing)—and then the condition in which I find him in, it would be only reasonable to assume that it dated to that time, because if he was working on top of a coal car, he wasn't working with that back I saw.

Q. 153. So, then, is it, or is it not, your opinion, assuming those facts to be true, that he did receive an injury which brought into being this non-disabling spondylolisthesis?

A. Yes, sir, he did.

Q. 154. Doctor, could he have done any manual labor with the condition you found him in?

A. Well, I don't know what he could do. He can't sit in an upright manner. The only thing that he could possibly do, if he was skilled at some trade, would be to have a special bench built where he can get himself comfortable and do something with his hands; but you can't bend him forward.

Q. 155. Doctor, when you were pointing out on your X-rays a while ago to the jury and you were describing the [fol. 338] manner in which the fifth lumbar vertebra is now situated with reference to the sacrum—(coughs) pardon me, doctor—did you state or did I understand you to state that the condition of those bones with reference to each other show or indicate that there was a slipping to the midsection there which would cause them to be in the position they were in, or did you say that the spondylolisthesis, if it was present, could have caused the condition which you found?

A. This is a condition of dislocation.

Q. 156. Well, now, when you speak of——

A. We refer to it as spondylolisthesis because it is a slipping forward in that area. But this is what we call a complete spondylolisthesis. Now, that's a different thing than a partial.

Q. 157. Will you explain that, please?

A. Because you've got a separation, a complete separation, of the articular where it joins with the sacrum and the fourth above. So you would class this one here not as a true spondylolisthesis, but as a condition of spondylolisthesis produced by an anterior dislocation of the fifth vertebra.

Q. 158. You mean that there had to be some force applied to have that dislocation you are speaking of?

A. I wouldn't know how else it could get there.

Q. 159. As I understand you, even assuming that he did [fols. 339-340] have this congenital spondylolisthesis prior to the time you examined him and prior to the time he claims he was hurt, to get the dislocation which you find and have pointed out to this jury, he had to have an injury to do that?

A. In my opinion, that is a traumatic injury, yes, sir.

Q. 160. That's your opinion?

A. Yes, sir.

Q. 161. Do you mean to say by that, then, that even if he did have this congenital spondylolisthesis, that it wouldn't be or wouldn't act as what you found, or produce what you found in his body?

A. No, sir; congenital—the condition in that condition is of an entirely different degree.

. . . . . .

[fol. 341] Q. 167. Would he have a stiff back even if that operation were successful?

A. That's what the operation is performed for, is to give him a stiff back.

. . . . . .

[fols. 342-344] Q. 169. Doctor, you say either way they do it, and that does not appear in the record, he is either going to be bent forward the way you were bending or bent backward, is that right?

A. That would be my opinion. He is going to be in one of the two positions. He can't move.

. . . . . .

[fol. 345] Q. 180. And it is your opinion his spine is dislocated?

A. Yes. I think before we would go into all this surgery we are talking about, it would be a good thing to think it over twice.

• • • • • • •

[fols. 346-364] Cross examination.

By Mr. Sanders, Sr.:

Q. 1. Dr. Kinter, you are not a medical doctor?
A. No, sir, I'm an osteopath.

• • • • • • •

[fol. 365] Q. 112. Yes. Now, Dr. Kinter, I believe you say that plaintiff here came to see you first on February 3rd, 1959, right?
A. Right.

• • • • • • •

Q. 119. Well, did you ask him if prior to that time he had ever had any low back disability?
A. I did.
[fol. 366] Q. 120. What did he say?
A. He didn't admit any. He said he had been working regularly.
Q. 121. Well, he told you he had not had any previous back disability, didn't he, doctor?
A. That's my—yes, sir.
Q. 122. He denied it. Of course, when a person comes to you complaining of a low back disability, that can be a right serious thing, can't it?
A. Sure.
Q. 123. And coming to you for an examination and diagnosis, it's very important for you to find out whether that person had any previous back disability throughout the years as the cause of it, isn't it?
A. I would like to know that, certainly.
Q. 124. And he told you he had been injured in an accident about a year prior to that time on the Railroad, right?
A. That's right.
Q. 125. And you asked him if he had had any difficulty with his back prior to that time, and he denied it?
A. He denied it.

Q. 126. He didn't tell you he had had this low back trouble in the Army and had gotten a medical discharge from [fol. 367] the Army on account of it, did he?

A. He did not tell me that.

• • • • • • •

[fol. 368] Q. 138. Well, you would include—you would say that you are as well qualified to diagnose a condition like this as any orthopedic surgeon or neurosurgeon in this area?

A. I don't know that—in that, I said I would just as [fol. 369] soon trust my interpretations as his, wherever he might be.

• • • • • • •

Q. 140. But you do feel that you are as well qualified, though, to interpret these X-ray pictures and diagnose this condition as any orthopedic surgeon or neurosurgeon in this entire area, correct?

A. Yes, sir; I will read pictures with anybody in this area, I think. That's my humble opinion, sir.

Q. 141. And what area would you include in that, doctor—Roanoke, Charlottesville, Virginia?

A. I wouldn't be fussy where we took it to. I don't think it would make any difference.

Q. 142. Doctor, now, you say you saw him on February 3rd, you examined him, and you found the condition that [fol. 370] you have testified to. Did you treat him?

A. I have never treated him.

• • • • • • •

[fols. 371-378] Q. 146. Well, then, I understand that you feel that you are as well qualified to pass on the advisability of surgery here and the results of surgery in this particular case as the orthopedic surgeon and the neurosurgeon that would actually perform the operation. Do you feel that way?

A. I have had a pretty good look at him. I think I know about what is wrong with him and what he can expect.

Q. 147. That doesn't quite answer the question.

A. Yes. Then let's put it the other way. I'll answer it, "Yes."

• • • • • • •

[fol. 379] Orrien K. Trigg, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

[fol. 380] Direct Examination.

By Mr. Walter W. Burton:

• • • • • • •

Q. 4. What is your occupation?
A. Yard brakeman.

• • • • • • •

Q. 6. Where do you work for the N. and W.?
A. In Bluefield, West Virginia, the N. and W. Railroad.

• • • • • • •

[fol. 381] Q. 15. In the early morning of January 23rd, 1958, were you working for the N. and W. Railroad Company as a yard brakesman?
A. Yes, sir, I was.

• • • • • • •

[fols. 382-383] Q. 24. Were all of you engaged in a switching operation there that night?
A. That's right.

• • • • • • •

[fol. 384] Q. 37. Approximately how long is a railroad car?
A. Around thirty-seven feet.

• • • • • • •

Q. 39. Is there a hump, or high place, located near the Mercer Street bridge——
A. That's true.

• • • • • • •

Q. 42. Is it also not true, Mr. Trigg, that a car will [fols. 385-389] roll of its own volition west from that point, and it will also roll east of its own volition from that point?

A. That's right.

. . . . . .

Q. 46. Was it the duty of the conductor to direct this switching operation, including who, when, how and what cars would be cut loose and what men should get up on those cars and go with them to their specific destinations?

A. That's true.

Q. 47. Mr. Trigg, how does the engineer know to move these cars in any specific direction?

A. By a red light and a white light and a flashing yellow.

Q. 48. Who controls that light?

A. The conductor.

. . . . . .

[fol. 390] Q. 86. Where were you standing immediately before it is claimed Carl Still was injured?

A. Well, I am an air bleeder. At the time they told me to get up and ride, and then I got up a few cars behind him on the train, and as he was shoving the train out, he gave a terrific jerk and I did see him go around on the car after that jerk.

. . . . . .

Q 88. Had his car been cut loose—that is, Carl's car?

A. Yes.

. . . . . .

[fol. 391] Q. 91. So the string of cars was located on the lead track?

A. On the lead track.

Q. 92. He had been cut off from that string?

A. That's right.

Q. 93. And had started to roll?

A. That's right.

Q. 94. Still on the lead track?

A. Still on the lead track.

Q. 95. And at that time the train ran into the back of him and recoupled with him?

A. That's right.

. . . . . .

[fol. 392] Q. 104. Where was Mr. Still when you saw him out there in front of you?

A. He was two or three cars ahead of me looking forward on another car like this.

Q. 105. He was looking west?

A. Yes.

Q. 106. And his car was rolling in a westward direction?

A. That's right.

Q. 107. Now, where was the engine? It was back east, is that right?

[fol. 393] A. Yes, the engine was about—I wouldn't know exactly how many yards, but about half way the yard, a quarter to a fifth of a mile.

* * * * * * *

Q. 109. And you say Carl was west of you rolling on a car that was moving of its own volition?

A. That's right.

Q. 110. Now, when you saw this recoupling of the car Carl was on, what effect did that have on you personally, Mr. Trigg?

A. Well, when it hit and the cars jerked, at the time they probably had the red board, and it jerked, and if anyone—it was subject to knock them off, or anything, which it did. I seen his light laying on the ground.

Q. 111. Did it have any effect on you?

A. Yes.

Q. 112. What effect did it have on you?

A. It liked to have knocked me off, too.

* * * * * * *

Q. 114. And how many cars away from Carl were you, approximately?

A. I will say maybe two or three; I wouldn't know for sure. I didn't know at the time. I just climbed up behind.

[fols. 394-395] Q. 115. At which place would the jerk be the most violent?

A. On the head end, which was shoving, going into him and coupling up, it would be a pretty hard jerk.

Q. 116. So it would be a harder jerk where Carl was than where you were?

A. Well, there wouldn't be much difference, but by coupling up to him, it would make a difference.

Q. 117. Would it make it harder or easier?

A. It would make it harder because it was coupling up to him.

Q. 118. What was the color on the board, if you can recall, at the time Carl Still was cut loose from that train?

A. I believe it was red. I believe the light was red.

Q. 119. How long had the light been red from the time Carl was uncoupled until the time the train struck his car?

A. Well, he never did stop, just kept pushing. I don't know whether he seen the light or what happened. Anyway, he just kept going. He never did stop.

Q. 120. So, as far as you know, that light stayed red from the time Carl Still was cut loose until the train recoupled?

A. Yes, to the best of my knowledge.

. . . . . .

[fol. 396] Q. 130. Did you see Carl Still get down off of the car? Do you know how he got down?

A. No, I do not.

Q. 131. Now, Mr. Trigg, at the time of the recoupling and jerking of Carl's car, just what did you see happen to Carl?

A. Well, it throwed him around on the car up against it, or somewhere. I seen him go around.

Q. 132. Looking again, now, to Plaintiff's Exhibit No. 2, where was Carl standing?

A. He was standing on the brake step.

. . . . . .

[fol. 397] Q. 139. Do you know how he got off of the car, Mr. Trigg?

A. No, I do not.

. . . . . .

[fols. 398-399] Q. 147. It was on the ground?

A. Yes; the light and the stick was on the ground.

. . . . . .

[fol. 400] The Reporter: (Reading from the record) "Would you please describe for the jury the method in which Mr. Davis handled the engine generally that night immediately prior to the accident?"

A. That's before the accident happened?

Q. 152. Yes.

A. Well, it was rough all the way.

Q. 153. What do you mean, "it was rough all the way," Mr. Trigg?

A. Well, he was rough with the train. Some engineers is better than others, and he was rough, by handling the train jerking and all that.

Q. 154. Have you ever complained to any official of the Norfolk and Western Railroad about the manner in which he handled——

A. That's right.

[fols. 401-402] Q. 155. (Continuing)—the train? Who did you complain to?

A. I have complained to the conductor. And all the boys have been around talking about how this engineer handles the train, and he was rough; and all of them know he is rough.

Mr. Sanders, Sr.: We think they should give us the names of these parties that have complained.

The Court: All right.

A. (Continuing) I guess all of them that worked on that job. If they are on the witness stand, they can tell you themselves.

* * * * * * *

Q. 157. Have you told it to the conductor?

A. Yes, sir; yes, siree.

Q. 158. Have you heard others tell the conductor?

A. That's right; and I have heard them speak of it on the motor cars as I was riding up and down the yard.

* * * * * * *

[fol. 403] Q. 163. Will you please explain to the jury what can bring about a rough engineer? That is, what can he do to keep from doing that?

A. If an engineer is on the alert and apply his brakes

properly, and instead of waiting and jerking those cars all at once, with all that slack, it is subject to hurt anyone; anyone that is on the train riding, it is subject to throw them off. The other engineers have been better because they have handled the train better. And at that time he was just a rough engineer. We have a lot of other engineers that don't handle the train the way he handles it.

• • • • • • •

[fols. 404-407] Q. 165. Can those brakes be applied in an easy way so that the train will stop without jerking, Mr. Trigg?

A. That's true.

• • • • • • •

[fol. 408] Q. 189. Now, Mr. Trigg, on January—the night of January 22nd, and the early morning of January 23rd, 1958, immediately before Carl Still claims he was injured, what was his apparent physical condition and ability to perform his services there for the Norfolk and Western Railroad Company?

A. Well, he was riding them like other boys, and he climbed up on it just like he always did.

Q. 190. Did he ever have any trouble, to your knowledge, in performing his duties prior to that time?

A. Not to my knowledge, he didn't.

Q. 191. After you saw him on the car on the night—or early morning of January 23rd, 1958, did you ever see him come back down to the railroad yards?

A. Not after he left; if—he did come back and was sitting on the benches around there, but I never saw him work.

Q. 192. You never saw him do any more work?

A. No.

Q. 193. Mr. Trigg, during this entire time that you were working with Carl Still, would you please describe his apparent physical condition? That is, was he a strong man, or a weak man, or what was he?

A. Well, you couldn't hardly handle the cars unless you was capable of taking care of them and riding them, and [fols. 409-412] he seemed to be a good brakeman to me.

Q. 194. And was he able to handle those cars?

A. Yes, he did.

Q. 195. And that was during the entire time that you worked with him?

A. That's true.

* * * * * * *

Cross-examination.

By Mr. Sanders, Sr.:

* * * * * * *

[fol. 413] Q. 29. You got up on the train when it was moving?

A. That's true.

Q. 30. It was moving slowly in a westerly direction, is that right?

A. Moving what?

Q. 31. Slowly.

A. What would you call "slowly"?

Q. 32. What would you call it? How fast was it going?

A. I wouldn't say. I didn't have a speedometer or anything. I wouldn't know just how fast it was going; but it was moving.

Q. 33. It was moving?

A. Yes.

* * * * * * *

[fol. 414] Q. 37. Now, how fast was this train moving west when you got up on it? Do you have any idea?

A. I wouldn't know how fast.

* * * * * * *

Q. 45. After the car had been cut off, did you see it moving on down the track?

A. That's for sure.

Q. 46. You saw that. At that time how fast was the train going that you were on?

A. I still do not know that.

Q. 47. Don't know it. How fast was the car going along [fol. 415] that Carl Still was riding?

A. I do not know that.

* * * * * * *

[fol. 416] Q. 59. And how far back were you riding? How many cars were you riding——

A. Two or three cars.

Q. 60. (Continuing)—westerly of Still at the time the train coupled up?

A. Approximately two or three cars.

Q. 61. Or was it—could it have been three or four?

A. Well, I didn't say. I say it could have been three or four—I don't know because I was behind, and I know I was behind. But I wasn't too far that I couldn't see, I mean.

Q. 62. Would you say you were about three or four cars [fols. 417-423] behind him?

A. I just say three or four.

Q. 63. How many do you say?

A. I will say three or four.

* * * * * * *

[fol. 424] Q. 108. Were you looking at Carl Still when the train you were on coupled up to the car he was on? Answer that yes or no.

A. Yes.

Q. 109. Was that when he was thrown around?

A. That's when he hit—when it hit him, hit the car he was riding.

Q. 110. Was that when Carl Still was thrown around in the manner you are testifying?

A. That's right, yes.

Q. 111. Yes. Now, you were three or four cars back?

A. That's true.

Q. 112. You didn't get thrown off the car, did you?

A. No, I didn't get thrown off.

Q. 113. And you didn't get hurt in any way?

A. No.

Q. 114. I believe you say that frequently cars couple up down in the yard; trains couple up to cars when they are in motion, don't they?

A. Sometimes they do.

Q. 115. And sometimes the trains couple up to cars that are standing, don't they?

A. Yes.

[fol. 425] Q. 116. They couple up both ways: when the cars are in motion and when they are standing?

A. Yes.

* * * * * * *

Q. 119. Anyway, you say when the cars coupled you saw Carl Still thrown around?

A. Yes.

Q. 120. Now I believe you further said that he was riding—he was facing west?

A. Yes.

Q. 121. Facing west. He was standing on the brake-step facing in the direction of Graham, Virginia, west, is that true?

A. Yes.

. . . . . .

[fols. 426-436] Q. 123. Right? Now, how was Carl thrown around when you saw him? Which way was he thrown?

A. He was thrown up on the car.

Q. 124. Thrown up on the car?

A. Yes.

Q. 125. Up on top of the car?

A. I couldn't say he went on top of it. I know he went up on it. His light and things hit the ground. Where he went, I don't know.

Q. 126. Which side of the car was he thrown on—his right or his left?

A. Which side he was thrown on?

Q. 127. Yes.

A. His left side.

Q. 128. And he was thrown up on the car?

A. Up against it. I wouldn't say he was up on it. It was an empty hopper. He couldn't have been on it.

. . . . . .

[fol. 437] Re-direct examination.

By Mr. Walter W. Burton:

Q. 1. Mr. Trigg, whose duty is it to see that after a car has been cut loose and starts to roll, that the west end of the train doesn't come in contact with that car that has been cut loose?

A. The conductor.

. . . . . .

[fol. 438] Re-cross-examination.

By Mr. Sanders, Sr.:

Q. 1. Now, I believe that the claim adjuster came around to see you, Mr. J. F. Jamison, and talked to you about this and took a statement from you?

A. That's right.

Q. 2. And you signed it?

A. That's right.

Q. 3. Is that your signature (indicating on a paper)?

A. That's right.

Q. 4. Do you want to read that over?

The witness thereupon examined the statement in question.

Q. 5. You signed that?

A. That's right.

Q. 6. I am going to read it to you and ask you if that isn't what you told Mr. Jamison, if this isn't the statement you made.

Mr. Walter G. Burton: Would you let us see it?

The Court: Let the gentlemen see it, please.

Mr. Sanders, Sr.: Sure.

Counsel for the plaintiff thereupon examined the statement in question.

Mr. Walter G. Burton: We don't object.

Q. 7. Now, I want to read this statement to the jury. [fol. 439] "Bluefield, West Virginia, July 19th, 1958.

"My name is O. K. Trigg. I live in Bluefield, Virginia, and am employed by the Railway Company as a yard brakeman.

"On the night Carl Still was hurt during January, 1958, I was riding the cut about three or four cars back of the car Still had. The engineer jerked the cars right hard. Later I learned Carl had been hurt. I do not recall him working any more that night, am sure he did not ride cars. He continued to come out for several days, but he was not able to work. He said he could not throw switches. I never saw him ride cars or do his other usual work after he was hurt.

"I have read this statement and it is correct.

"O. K. Trigg."

Is that right?

A. That's true; everything is true.

Q. 8. Now, in that statement you said: "The engineer jerked the cars right hard. Later I learned Carl had been hurt."

A. That's true.

Q. 9. Now, did you tell Mr. Jamison that you had seen him thrown against the car when the car stopped?

A. Is that on there?

Q. 10. No.

A. Well, he didn't ask me that.

[fol. 440] Q. 11. He didn't ask you that?

A. No.

Q. 12. But you didn't tell him that?

A. No; he asked me the questions and I gave it to him on there.

Q. 13. But it isn't on that statement?

A. No, it's not on there. If he had asked me, it would have been on there.

Q. 14. Well even it he didn't ask you, if you actually saw Still at the time the coupling was made and you saw him thrown against the side of the car, why didn't you tell Mr. Jamison that?

A. That's the reason I said later I learned he got hurt. I didn't know it until I went down the yard and come back. That's the reason I made the statement on his statement. He could have hit the car and still I wouldn't know whether it hurt him. That's his feelings; I didn't know he was hurt.

Q. 15. But this is your statement——

A. That is my statement. I signed it, and everything on there is true.

The Court to the Witness: Let him finish his question.

Q. 16. This statement was given by you July 19th, 1958, several months after the accident occurred, and at that [fols. 441-442] time you did know Still was claiming he had been hurt?

A. Claiming——

Q. 17. You knew when you gave this statement Carl Still was claiming he was hurt in this collision?

A. That's right.

Q. 18. But you didn't tell Mr. Jamison you actually saw Still thrown against the car, did you?
A. He didn't ask me that.

• • • • • • •

[fol. 443] ARTHUR BROWN, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

Q. 1. What is your name, please, sir?
A. Arthur Brown.

• • • • • • •

[fols. 444-446] Q. 6. How long have you worked on the Bluefield Yards as a yard brakesman?
A. Twelve years.

• • • • • • •

Q. 11. On the night of January 22nd, 1958, and the early morning of January 23rd, 1958, were you working as the yard brakeman——
A. Yes, sir.

• • • • • • •

[fol. 447] Q. 33. On what end of that string was that engine attached—the east or west end?
A. The east end?

• • • • • • •

Q. 35. And what end of that string of cars were you men working on?
A. The west end.

• • • • • • •

Q. 38. Approximately how many cars were there in this string?

A. Oh, about—not knowing exactly—they said about sixty-some cars.

• • • • • • •

[fol. 448] Q. 42. Is there a hump or high place there somewhere near the Mercer Street bridge which is a dividing point between the East and West Yards?

A. Yes, sir.

Q. 43. Is it true that from this point a car will roll of its own volition west or east?

A. Yes, sir.

Q. 44. And if they are rolling west, then they are rolling down through the West Yards?

A. Yes, sir.

• • • • • • •

[fol. 449] Q. 50. Was it the duty of the conductor to direct this switching operation?

A. Yes, sir.

• • • • • • •

Q. 53. How does he operate it?

A. Through a control, switch control, on the box there.

Q. 54. How many signals can he give with that switch box?

A. Stop, start, and a back-up.

• • • • • • •

[fols. 450-452] Q. 65. Is the signal so located there in the yard that either the conductor or the fireman can see it at all times?

A. Yes, sir.

• • • • • • •

[fol. 453] Q. 88. Now, what color was the board at the time Carl's car was cut loose?

A. He throwed a red board.

Q. 89. Who throwed the red board?

A. The conductor.

Q. 90. Had the train stopped?

A. No, sir.

Q. 91. It was still pushing?
A. Yes, sir.

• • • • • • •

[fol. 454] Q. 95. Well, approximately how long was the particular coal hopper he was on that night, if you recall?
A. I guess about forty feet.

• • • • • • •

Q. 97. Now, after Carl's car was cut loose did the engineer change the signal on that board—I mean the conductor—did he change that signal, to your knowledge?
A. No, sir.
Q. 98. How long was it after Carl was cut loose before the engineer stopped pushing against that red board?
A. About three car-lengths, approximately.
Q. 99. In time, approximately how long did he push against that red board?
A. Well,——
Q. 100. Just estimate it, sir, to the best of your knowledge.
A. I guess two or three minutes.

• • • • • • •

[fol. 455] Q. 103. Did you see Carl Still at the time the west end of this string of cars struck the east end of the car he was riding on?
A. I could see his head and shoulders, yes, sir.
Q. 104. Did you see what happened to him?
A. No, sir.
Q. 105. Did you see him get down off the car?
A. Well, when I got down there he was on the side of it getting down off it.
Q. 106. Did he get down by himself or did anybody help him?
A. To the best of my recollection, Sports—Harry Manns was helping him off the side of the car.

• • • • • • •

Q. 108. Did you ask Carl any questions when you saw him there on the ground?
A. Well, I asked him was he hurt.

Q. 109. What did he say?

A. He said he was hurting through his back and hip up [fol. 456] here.

* * * * * * *

Q. 113. How did he get on the motor car?

A. Well, they helped him on the motor car. I think we helped him on the motor car.

* * * * * * *

Q. 115. Was he complaining at that time of any pain or discomfort?

A. Yes, sir, he was complaining with his hip and his back, said it was hurting through there.

Q. 116. What direction was Carl Still facing immediately prior to the time the west end of that train struck the east end of the car upon which he was riding? Which way was Carl facing?

A. Oh, well, he was going west, and I presume he was looking west.

Q. 117. Whose duty is it to see that the west end of [fol. 457] that string doesn't hit the east end of a car after it's been cut loose?

A. Well, it's the conductor's duty. He controls the board.

* * * * * * *

Q. 122. Mr. Brown, did you see Carl's lantern and brake stick there at the time it's alleged he was injured?

A. I saw his lantern when it fell off the car.

* * * * * * *

[fol. 458] Q. 127. Assuming that it was in that position and had been put in there properly, Mr. Brown, how strong a jerk or lick would it take to knock that brake stick out and the lantern off?

A. Well, it would take a pretty hard jerk.

Q. 128. Now, this particular time at which Carl Still was injured, I think you said that he had been uncoupled and had started to drift west?

A. Yes, sir.

Q. 129. Now, in your own words, please, sir, describe what happened. Just tell us what happened after he got cut loose.

A. Well, after he got cut loose he was ahead of the train, and the conductor gave a red board, and the train just come on and run into him—caught up with him, and when it stopped, the slack run out and bumped the car he was on.

Q. 130. How hard a lick was it?

A. It was pretty hard.

• • • • • • •

[fol. 459] Q. 132. Describe the noise for us.

A. Well, it was—when a train stops you can hear the slack, and it has a terrific sound. You know, any time a train stops suddenly, the slack runs out, and you hear that sound.

Q. 133. Was this the usual stop?

A. I wouldn't say so, no, sir.

Q. 134. Would you say it was easier or harder than the usual stop?

A. I would say it was harder than the usual stop.

• • • • • • •

Q. 137. Did you see Harry Manns start to run?

A. If I am not mistaken, he run and tried to keep the car cut off.

• • • • • • •

[fol. 460] Q. 143. How far was Carl Still from the conductor?

A. Well, when he got hurt?

Q. 144. Yes.

A. He had rode approximately—about three car-lengths.

Q. 145. About three car-lengths?

A. Yes, sir.

• • • • • • •

Q. 147. Was there anything there to obstruct the conductor's vision from seeing that the west end of this string of cars was going to strike the east end of the car Carl Still was riding on?

A. Not to my knowing, no, sir.

Q. 148. Could you see it was going to do that?

A. Yes, sir.

Q. 149. Where was the conductor looking all this time, if you can recall?

[fol. 461] A. I don't know where he was looking at. He was there watching the movements. I don't know whether he was looking directly at Carl or the train, but, anyway, he was watching the movements.

• • • • • • •

Q. 159. After the time it is alleged Carl Still was injured, did you see Carl any more back down there on the [fol. 462] yards?

A. Yes, sir.

Q. 160. Did you see him do any work?

A. No, sir.

Q. 161. Prior to the early morning of January 23rd, 1958, was Carl able, so far as you know, to adequately perform his services there as a yard brakesman?

A. As far as I know, yes, sir.

• • • • • • •

Q. 164. Had he ever had any difficulty that you had ever observed in properly performing his duties?

A. No, sir.

Q. 165. How long had you worked with him, Mr. Brown?

A. Off and on, about eight years.

Q. 166. About eight years?

A. Yes, sir.

Q. 167. Did you ever see him at any time unable to do his work there—either to hold the cars, to get on or off [fols. 463-464] cars, or to perform his services there for the Railroad Company?

A. No, sir.

• • • • • • •

Q. 169. When you all left that morning, describe how Carl was, that is, his physical condition, at that time. Was he able to walk around or how did he move?

A. You mean going home?

• • • • • • •

Q. 171. Yes, sir.

A. Well, he was in pain, and we had to help him down the bank to the car.

. . . . . .

Q. 174. How did you help him, Mr. Brown?

A. Well, he couldn't hardly walk. He was in pain walking; and I don't know whether we got him under the shoulder or by the arm, but we helped him down the hill there to his car.

. . . . . .

[fols. 465-466] Cross-examination.

By Mr. Sanders, Sr.:

. . . . . .

[fol. 467] Q. 13. And the shop car—of course, you men often have shop cars that come in there, cars that need to go to the shop to have certain repair work done on them, don't you?

A. Yes, sir.

Q. 14. There is nothing unusual about that, is there?

A. No, sir.

Q. 15. And you take those out and take those down on what you call the "shop track"?

A. Yes, sir.

Q. 16. And they are taken to have repairs?

A. Yes, sir.

Q. 17. And that happens every day?

A. Yes, sir.

Q. 18. So, you saw Carl get up on this car. Was the train moving when he got on it?

A. Yes, sir.

Q. 19. The train was moving slowly?

A. It was moving, yes, sir.

Q. 20. How fast——

A. It was moving, yes, sir.

Q. 21. Moving slowly. How fast was it moving—two or three miles an hour?

A. I wouldn't say how many miles it was moving, but it was moving.

Q. 22. About the usual speed?

[fols. 468-470] Yes, sir.

Q. 23. The usual speed you have in those kind of operations?

A. Yes, sir.

• • • • • • •

Q. 26. But when the train is standing still, the engineer always has to bump it before they can cut the car off, doesn't he?

A. You can't cut a car when it is standing still.

Q. 27. When he bumps it and pushes it forward a little, then you can cut it off?

A. It's moving, yes, sir.

Q. 28. Yes. So, then, it's a very ordinary thing to cut cars off when the train is in motion, isn't it?

A. Yes, sir, that is usually the procedure, yes, sir.

• • • • • • •

[fols. 471-472] Q. 50. And then the car that Carl was on drifted away from the train, the end of the train, didn't it?

A. Yes, sir.

Q. 51. And then that car kept drifting on to the west and the train followed it, didn't it?

A. Yes, sir.

Q. 52. And the car never did get more than about six feet from the end of the train, did it, Arthur?

A. Approximately—about six feet, yes.

Q. 53. About six feet?

A. Yes.

• • • • • • •

[fol. 473] Q. 63. Of course, you didn't measure it; but is it your best opinion that the car and the train were never more than about six feet apart?

A. Approximately that away, yes.

Q. 64. All right. Now, then, the train gradually caught up with the car, didn't it?

A. It caught up with it, yes, sir.

Q. 65. It caught up with it?

A. Yes, sir.

Q. 66. And it coupled?

A. Yes, sir.

Q. 67. And at the time it coupled, of course, the car that Carl was on was moving away, wasn't it?

A. Yes, sir.

Q. 68. And how fast was that car moving that Carl was on? Would you know?

A. No, sir, I don't know how fast it was moving.

Q. 69. Evidently it must have been going a little bit slower than the train, wasn't it, else the train couldn't have caught up with it?

A. It must have been, yes, sir.

. . . . . .

[fol. 474] Q. 78. Were you looking at Carl Still at the time the cars coupled?

A. Were I looking at him?

Q. 79. Were you looking at him, yes.

A. I could see his head and shoulders up over the car, yes, sir.

Q. 80. What occurred when the train coupled up to this [fol. 475] car?

A. What occurred?

Q. 81. What did you see?

A. His light come off the car.

Q. 82. Huh?

A. His light fell off the car.

Q. 83. His light fell off?

A. Yes, sir.

Q. 84. But you still saw his head and shoulders up there on the car, didn't you?

A. When they coupled? He was getting down then.

Q. 85. But before they coupled you saw his head and shoulders?

A. Yes, sir.

Q. 86. And he was riding on the brake-step?

A. Yes, sir.

Q. 87. And then did you continue to watch him?

A. After he hit so hard, he was getting down on the side of the car the next time I saw him.

Q. 88. The next time you saw him, then, he was getting down?

A. Yes, sir.

• • • • • • •

[fol. 476] Q. 90. Do you think Harry Manns, or Sport Manns, helped him down off the car?

A. Yes, sir.

Q. 91. You didn't help him down off the car?

A. No, sir; when I got there, he was on the ground.

Q. 92. Was there anyone there when he got off the car other than you and Sport Manns?

A. If I am not mistaken, the motor car was there along where he got off.

Q. 93. The motor car?

A. Yes, sir.

Q. 94. Any other brakemen there?

A. I don't remember seeing any other brakemen, no, sir.

Q. 95. And you think Harry Manns helped him off the car?

A. Yes, sir.

• • • • • • •

Q. 97. You say he made a statement there then?

A. First, we asked him was he hurt.

• • • • • • •

Q. 99. What did he say?

A. He said right through here, his back and hips were [fol. 477] hurting him.

Q. 100. You are positive he said his back?

A. Yes, sir.

Q. 101. You couldn't be mistaken about that?

A. No, sir.

Q. 102. His back and his hips?

A. Yes, sir.

Q. 103. And then what did he do?

A. He got on the motor car.

Q. 104. And went on down to the shanty?

A. Up to the shanty.

• • • • • • •

[fol. 478] Q. 113. And you said something a while ago about helping him along the way. Did you help him any?

A. Across the track and down the hill.

Q. 114. And helped him to the car?

A. Yes, sir.

Q. 115. You are sure of that?

A. Yes, sir.

Q. 116. Why did you help him?

A. He was in pain. He couldn't hardly walk.

Q. 117. Claimed he couldn't walk?

A. Yes, sir.

Q. 118. And you helped him across the tracks and into the car?

A. Yes, sir.

Q. 119. And, then, who drove the car?

A. I don't know whether he drove or Buster Dye drove. I think Buster Dye drove the car.

. . . . . .

[fol. 479] A. Not that hard, no, sir.

. . . . . .

Q. 127. And when you cut a car off from a train in motion and ride it on down ahead of the train, you, of course, are instructed to keep your eyes on the train behind you, aren't you, as well as in front of you?

A. Well, it is a general practice to look both ways.

Q. 128. To look both ways?

A. Yes, sir.

Q. 129. And in this case, you say that the train behind was never any further away from this car than about six [fol. 480] feet?

A. Approximately, yes, sir.

Q. 130. As they went down the track?

A. Yes, sir.

Q. 131. And under those circumstances the brakemen have been trained to keep their eye on this train following them, haven't they?

A. Well, you are trained to look out in front of you to keep from cornering anybody, but it is a general practice to look both ways, behind you and in front of you.

Q. 132. And you are instructed to look behind, too, aren't you, because the train is following you along there?

A. Just a general habit.

Q. 133. It's a general habit and it's well known and practiced by all brakemen on the railroad, isn't it?

A. Yes, sir.

Q. 134. To look behind you and in front of you and protect yourself on the railroad?

A. Yes, sir.

• • • • • • •

[fol. 481] Q. 138. Then, after you saw—or after the conductor saw that the train was going to couple up to this car again, he gave the engineer a red board, didn't he?

A. He gave him a red board when he cut the car off.

• • • • • • •

Q. 142. Is it customary to stop a train down there every time a car is cut off of it when you are classifying cars?

A. Well, the shop track is track number fifteen, and you have to stop the train for the car to go in the shop track because that's your first switch off your lead.

• • • • • • •

[fol. 482] Q. 149. Now, Arthur, I believe on July 17th, 1958, you gave Mr. J. F. Jamison, who was then the claim adjuster with the Railroad Company, a statement, didn't you?

A. Yes, sir.

• • • • • • •

Q. 152. Now, I am going to read this statement to you, Arthur.

[fol. 483] A. Yes, sir.

Q. 153. (Reading) "Bluefield, West Virginia. July 17, 1958.

"My name is Arthur Brown. I live at 208 Reece Street, Bluefield, and an employed by the railroad as a yard brakeman.

"I was working on the night Carl Still was hurt during January, 1958. I was standing by the stove while the

cut of cars were passing. The cars jerked as they passed me and I understand that was when Carl was hurt. I helped him off the car. The car he was riding on was about one car-length from the stove. He was complaining that his left leg was hurt.

"Still did not work any more that night. I believe he left before the shift was over. He reported several nights after that but did no work—just sat around the shanty. He had trouble walking—had to walk slow and could hardly get over the rails. On one of these nights Still went home about one hour after reporting. Some of the other men told us Mr. Beavers wanted Still to ride cars and that Still told him he could not do that work. Mr. Beavers then told him to go on in—so I was told. I do not recall helping Still to his automobile.

"On the nights I worked after Still's accident he did not work—just reported and sat around.

"I have read this statement and it is correct."

* * * * * * *

[fol. 484] Q. 156. Well, the accident occurred about twelve-thirty in the nighttime?

A. Yes, sir.

Q. 157. And then Carl worked—stayed on the job until about seven o'clock in the morning and then went home?

A. Stayed in the shanty, yes, sir.

* * * * * * *

[fol. 485] Q. 162. Did you help him off the car?

A. No, sir.

Q. 163. In this statement you are mistaken?

A. Yes, sir.

Q. 164. You told Mr. Jamison, you said, "I helped him off the car."

A. Yes, sir.

Q. 165. That wasn't correct then, was it?

A. No, sir.

Q. 166. Now, in this statement you also said, "He was complaining that his left leg was hurt."

A. Yes, sir.

[fol. 486] Q. 167. And you said nothing about his back being hurt, did you?

A. Not in that statement, no, sir.

Q. 168. Not in that statement?

A. No, sir.

Q. 169. And you didn't tell Mr. Jamison anything about him complaining about his back, did you?

A. No, sir.

Q. 170. You just said that he was complaining that his left leg was hurt?

A. Yes.

• • • • • • •

"Form G 4

NORFOLK AND WESTERN RAILWAY CO.

[fols. 487-497] Bluefield, W. Va.
July 17, 1958

My name is Arthur Brown. I live at 208 Reece Street, Bluefield and am employed by the railroad as a yard brakeman.

I was working on the night Carl Still was hurt during January 1958. I was standing by the stove while the cut of cars were passing. The cars jerked as they passed me and I understand that was when Still was hurt. I helped him off the car. The car he was riding was about one car length from the stove. He was complaining that his left leg was hurt.

Still did not work any more that shift. I believe he left before the shift was over. He reported several nights after that but did no work—just sat around the shanty. He had trouble walking—had to walk slow and could hardly get over the rails. On one of these nights Still went home about one hour after reporting. Some of the other men told me Mr. Beavers wanted Still to ride cabs and that Still told him he could not do that work. Mr. Beavers then told him to go on in—so I was told. I do not recall helping Still to his automobile.

On the nights I worked after Still's accident he did not work—just reported and sat around.

I have read this statement and it is correct.

(Signed) Arthur Brown.

Witness: J. F. Jamison."

• • • • • • •

[fol. 498] THORNTON MAGRUDER, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

• • • • • • •

[fol. 499] Q. 7. How long have you worked for the Norfolk and Western Railroad Company as a yard conductor?

A. I believe that I was promoted in January, '47.

• • • • • • •

[fol. 500] Q. 18. How long have you known Mr. Still?

A. I have known him ever since he came on the railroad, but right offhand, I just don't know how long that was—about—I really don't know when he did come. Over a period of several years.

Q. 19. Excuse me, sir. On and prior to January 23rd, 1958, did Carl Still ever work as a brakesman over there in a crew that you were supervising as the conductor?

[fol. 501] A. Yes, sir.

Q. 20. Have you seen and did you see prior to January 23rd, 1958, the way that he performed his duties there as a brakesman?

A. Yes, sir.

Q. 21. How would you describe the way he performed his duties? That is, could he do them or couldn't he do them, or how did he get along?

A. Satisfactorily.

Q. 22. Satisfactorily?

A. Yes, sir.

Q. 23. What was his physical condition there, Mr. Magruder, apparently, so far as being able to perform his duties?

A. I would say it was good.

Q. 24. Have you ever seen him do any acts of strength that are not ordinary and usually seen in men of his stature?

A. Well, I have had him pick me up with his two hands.

Q. 25. Pick you up with his two hands; how did he do that?

A. Slip his two hands under my armpits and pick me up and set me around.

Q. 26. And how much do you weigh, Mr. Magruder?

A. Now I weigh about a hundred and fifty-five. Then I was weighing around a hundred and sixty-five.

Q. 27. Have you ever seen him stand there and do a [fol. 502] flip on the ground?

A. Yes, sir.

Q. 28. Could he do that?

A. Yes, sir.

Q. 29. How did he do that?

A. He just would throw his hands down and flip over.

Q. 30. Standing right on the ground?

A. Yes, sir.

Q. 31. Now, do you know an engineer over there, who works for the Norfolk and Western Railroad Company, by the name of A. N. Davis?

A. Yes, sir.

Q. 32. Have you ever had him working in crews over which you were the conductor?

A. Yes, sir.

Q. 33. Prior to January 23rd, 1958?

A. Yes, sir.

Q. 34. Would you describe the method that—and manner in which he handled a string of cars when you people were working there prior to January 23rd, 1958?

A. I don't know whether I understand what you mean there.

Q. 35. What kind of an engineer was he? Was he [fol. 503] smooth—rough? Just how did he do?

A. I am afraid I will have to say he was rough.

• • • • • • •

Q. 37. Describe what you mean by "rough," Mr. Magruder.

A. Well, when he—when he gets ready to stop, when he gets a stop signal, just stop like that (witness snaps his fingers).

Q. 38. Is it necessary to stop in what you signify a snap of your fingers.

A. No; no, it isn't.

Q. 39. What effect would that have on a string of cars when you stop that quick?

A. Well, if he was shoving these cars off the hump and [fols. 504-508] stopped suddenly that way, cars would have a tendency to snap—jerk.

Q. 40. To snap and jerk? Prior to January 23rd, 1958, had any brakesmen ever complained to you about the manner in which A. N. Davis operated as an engineer?

A. Uh—I couldn't say as to a specific date, but I have had several complaints, yes.

Q. 41. About Mr. Davis?

A. Yes, sir.

Q. 42. And the manner in which he handled the train?

A. Yes, sir.

• • • • • • •

[fol. 509] Re-cross-examination.

By Mr. Sanders, Sr.:

[fol. 510] Q. 1. Now, Mr. Magruder, I am not quite sure that I understand you. You say you did make a report to the emergency yard master, Kilgore, and what was it you reported to him about Mr. Davis?

A. This particular incident was too much speed.

Q. 2. Too much speed?

A. I asked him to slow the Diesel down. And the day following, this yard master asked me if I had to speak to

Davis, and I told him that I did, that my jack man said he would not work with him the following day——

• • • • • • •

[fol. 511] Q. 8. And why wouldn't he follow him?

A. He handled him a little too rough that night, I think, was his complaint to me.

Q. 9. He handled the train a little too rough. And you say that, based on what Mr. Wright said, you reported that to the emergency yard master, Kilgore?

A. Yes, sir.

• • • • • • •

Q. 15. And following that, you say this brakeman, Albert Wright, advised you that he wouldn't work with Mr. Davis any more?

[fols. 512-513] A. Yes, sir.

Q. 16. Well, has he worked with him since?

A. No, sir.

• • • • • • •

[fol. 514] Harry S. Manns, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

Q. 1. What is your name, please, sir?

A. Harry S. Manns.

Q. 2. Now, Mr. Manns, you are going to have to speak out so all the ladies and gentlemen can hear you and so Mr. Sanders sitting over here can hear you. How old are [fol. 515] you, Mr. Manns?

A. Thirty-eight.

Q. 3. Where do you live?

A. Bluefield, West Virginia.

Q. 4. What is your occupation?

A. A yard brakeman on the Bluefield yard for the N. and W.

Q. 5. You work as a yard brakesman for the Norfolk and Western Railroad Company in Bluefield?

A. Yes, sir.

Q. 6. What kind of a yard brakesman are you?

A. To help classify and switch trains and ride the cars.

Q. 7. Do you work in the yards, or do you go out on trips?

A. I work in the yard only.

Q. 8. How long have you been a yard brakesman in the Bluefield yards?

A. Since 1951.

Q. 9. Do you know the plaintiff, Carl Still, who sits here beside me?

A. Yes, sir.

Q. 10. How long have you known Carl?

[fol. 516] A. Since 1947.

Q. 11. Have you ever worked with Carl Still as a yard brakesman in Bluefield?

A. Yes, sir.

Q. 12. How long have you worked with Carl Still, if you can recall?

A. Since 1951, off and on.

Q. 13. In the early morning of January 23rd, the night of January 22nd, 1958, were you working for the Norfolk and Western Railroad Company as a yard brakesman?

A. Yes, sir.

Q. 14. And where were you working?

A. On the west yard.

Q. 15. In the city of Bluefield?

A. Yes, sir.

Q. 16. What shift were you working?

A. The eleven-fifteen, west yard.

Q. 17. Could you name some of the other brakesmen who were there that night, please, sir?

A. George Saunders and Buster Dye, Orrien Trigg, and Palmer, they was on the shift that night.

Q. 18. Well, now, Mr. Manns, there has been evidence introduced here that you gentlemen were engaged in a

[fol. 517] switching and separating operation there that night; is that correct?

A. Yes, sir.

Q. 19. And in that operation is it true that you were uncoupling cars and classifying them, taking them separately or in one, twos, or threes to different tracks from what is known as the "lead track"?

A. Yes, sir.

Q. 20. And is it also true, Mr. Manns, that on that lead track was situated an engine with a string of cars attached thereto? Is that correct?

A. Yes, sir.

Q. 21. Approximately how many cars were in that string, if you can recall?

A. I can't recall—around forty, I would say.

Q. 22. Around forty?

A. Yes, sir.

Q. 23. Who was the conductor there that night, if you can recall?

A. Conductor Taylor was the conductor.

Q. 24. And who was the engineer there that night, if you can recall?

A. Davis.

[fol. 518] Q. 25. There has also been evidence introduced here that the engine was attached to the east end of this string of cars and you men were cutting cars away from the west end of that string of cars; is that correct?

A. Yes, sir.

Q. 26. Referring now to Plaintiff's Exhibit No. 1, does this represent the lead track where the engine and string of cars were on that night?

A. Yes, sir, that's it.

Q. 27. And what is this where the two men are standing here in this photograph?

A. Well, we call that the stove; that's where the conductor stands that works the board and gives his instructions mostly—most of the time, from that place.

Q. 28. Are there signal lights situated in the yards there that the conductor gives his instructions with?

A. Yes, sir, they call it the switchboard.

Q. 29. And where are those different lights located?

A. One of them is opposite the conductor, east end.

Q. 30. And is that light shown in this Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. 31. Where is that light, please, sir?

[fol. 519] A. No, that light is not shown in there. That light is up east of the——

Q. 32. This picture doesn't show the signal light? What's this object right here (indicating)?

A. (Pauses) I didn't notice that. Let me look at it.

Q. 33. All right, sir.

The witness thereupon examined Plaintiff's Exhibit No. 1.

A. That don't look like the signal light to me.

Q. 34. That's not it?

A. It don't look like it.

Q. 35. Well, where is the signal light located in reference to where these men are standing?

A. It's to the east of them.

Q. 36. It's to the east of them?

A. Yes, sir.

Q. 37. All right, sir. Isn't this to the east of those men?

A. It looks like it is just right across to me.

Q. 38. But, in any event, there is a signal light located there near those men?

A. Yes, sir.

[fol. 520] Q. 39. All right, sir. Where are the other signal lights located?

A. One of them is on the Patrick—one of them is on the bridge. What bridge is that?

Q. 40. Is that the Allen Street bridge?

A. Well, there is one on the Allen Street bridge—yes, one on Allen Street bridge and one this side of Allen Street bridge, west of Allen Street bridge.

Q. 41. Would that be near Mercer Street bridge—or not—Easley bridge?

A. Easley bridge.

Q. 42. Near Easley bridge?

A. Near Easley bridge.

Q. 43. Now, can the conductor control all three of these signal lights from the panel he has there near the stove?

A. Yes, sir.

Q. 44. Now, there has also been evidence introduced in this case that this light will give three signals: a red signal

to stop the train, a solid yellow signal for the train to move west, and a blinking, or a flashing, yellow signal for the train to move east; is that correct?

A. That's correct.

[fol. 521] Q. 45. Now, there has also been evidence introduced here, Mr. Manns, that there is a hump there in the Bluefield yards located near the Mercer Street bridge from which cars will roll west of their own volition, and from which the cars will roll back east of their own volition; is that correct?

A. Yes, sir.

Q. 46. Who is in charge of you brakesmen—that is, who tells you what to do?

A. The conductor.

Q. 47. And who was the conductor that night?

A. Taylor was the conductor.

Q. 48. Immediately prior to the time that it is alleged that Carl Still was injured there, where were you?

A. I was standing close to him; not too close, but something like fifty or sixty feet.

Q. 49. Where were you in relation to the stove?

A. I was right at the stove.

Q. 50. Right at the stove?

A. Yes, sir.

Q. 51. Was the conductor there?

A. Yes, sir.

Q. 52. Who else was there, if you can recall?

[fol. 522] A. The car cutter was near there.

Q. 53. Who was the car cutter?

A. It was George A. Saunders.

Q. 54. What is the car cutter's duties—that is, what does he do there, Mr. Manns?

A. Well, he cuts the cars off that is supposed to separate. He separates the cars.

Q. 55. In other words, he uncouples the cars?

A. Yes, sir.

Q. 56. Now, in your own words, please, sir, will you describe to us just what happened at the time that it is alleged Carl Still was injured?

A. Well, at the time he was injured, I was standing there, and he was on a car, and the car cutter cut him off. He rolled out to go to the track that he was supposed to go in,

and, as he was rolling out, well, the conductor throwed the board red, I suppose.

Mr. Walter G. Burton: Well, don't "suppose."

The Court: Don't "suppose."

Mr. Walter G. Burton: Don't "suppose." If you saw it, all right.

The Witness: I didn't see it.

The Court: Just a minute.

[fol. 523] The Court to the Jury: I instruct you ladies and gentlemen not to consider the statement that the conductor threw the board red, he supposed.

By Mr. Walter W. Burton (Continuing):

Q. 57. Did you see the board, Mr. Manns?

A. No, sir, I didn't notice it.

Q. 58. All right, sir. Now, after Carl's car had been uncoupled, what happened?

A. The train was catching up with the car that Carl was riding, and we are accustomed to running to keep them cut when things like that happen.

Q. 59. And what did you do?

A. I run to cut the car loose that—I seen it was going to couple to the car that Carl was on, and I run to try to cut it loose, uncouple it.

Q. 60. Why did you run to try to keep it cut loose?

A. Well, to stop the movement—so it wouldn't slow the movement down on the yard that we was doing, engaging in.

Q. 61. All right, sir. Then what happened?

A. It coupled up to the car he was riding and jerked [fol. 524] it back just a little, and the severe jerk, I thought it had hurt him.

Mr. Sanders, Sr.: Move to strike that out, Your Honor.

The Court: Yes, I'll sustain the motion, and instruct the jury not to consider the statement, "I thought it hurt him."

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 62. Was there a severe jerk, Mr. Manns?

A. Yes, sir.

Q. 63. Now, you say the car coupled and jerked. What kind of a motion was that? That is, did the car, after it was coupled, roll, or was it all one simultaneous recoupling and jerking motion?

A. It all was one recoupling and jerking motion.

Q. 64. Now, what kind of couplers do these cars have on them? That is, are they automatic, or just how do they work?

A. They couple automatic, but you have to pull the cut lever up, which to cut them loose.

[fol. 525] Q. 65. Now, as I understand you, they will couple automatically?

A. Yes, sir.

Q. 66. But you have to uncouple them——

A. Yes, sir.

Q. 67. (Continuing)—manually?

A. Yes, sir.

Q. 68. Why did you run and not want that car to couple, Mr. Manna?

A. Because that's—I didn't want him to get hurt. You know, a jerk like that will hurt you sometimes.

Q. 69. Now, after you say this car was jerked, what happened to Carl Still? Did you see Carl?

A. Yes, sir.

Q. 70. When did you first see Carl after it was jerked?

A. Well, he was up on the step of the car, and I asked him if it hurt him.

Q. 71. What did he say?

A. He didn't say anything.

Q. 72. How did he get down off that car, if you know?

A. I don't know.

Q. 73. You don't know how he got down?

A. No, sir.

[fol. 526] Q. 74. Where was the conductor at this time, Mr. Manna?

A. I didn't see the conductor at that time.

Q. 75. Prior to the time you started to run when you saw that Carl's car was going to recouple, where was the conductor?

A. He was there at the stove.

Q. 76. From the position the conductor was in there at the stove—and, as I understand it, you were beside him?

A. Yes, sir.

Q. 77. (Continuing)—was there anything to keep the conductor from seeing that the back end of this train was going to recouple with the car Carl Still was riding on if he had looked?

A. No, sir.

Q. 78. Did the conductor, to your knowledge, give Carl Still any warning that that car was going to be recoupled to the string? Did he warn Carl in any way?

A. I don't know.

Q. 79. To your knowledge, did he?

A. No, sir.

Q. 80. Did you hear him say anything?

A. No, I didn't hear him say anything.

Q. 81. Did you yourself holler at Carl?

[fol. 527] A. No, sir.

Q. 82. Why didn't you?

A. Well, we just wasn't accustomed to hollering.

Q. 83. Could you have hollered if you wanted to?

A. Yes, sir.

Q. 84. Now, as I understand you, you say that you don't know how Carl got down off of the car?

A. No, sir.

Q. 85. You don't know?

A. No, sir.

Q. 86. After he got down off of the car, what was his condition? What did he say, if anything, and what did you do with him?

A. Well, he didn't say anything, but he was hobbling, trying to get in the motor car. I was picking his light and stick up.

Q. 87. And where were his light and stick?

A. Well, it knocked his light kind of under the motor car. The motor car was setting there and his stick was down the track farther.

Q. 88. Where is the usual place you put this light and stick when you are riding on a car which has an Ajax brake?

A. In the grab iron on top of the car.

[fol. 528] Q. 89. Mr. Manns, looking at Plaintiff's Exhibit No. 2, does this picture show the same type of car that Carl Still was riding on at the time he was hurt?

A. Yes, sir.

Q. 90. Now, where, pointing it out here on this, do you put the brake stick and the light?

A. They usually put it right here (indicating), stick it down through this first grab iron; stick the stick down through there and hang the light here.

Q. 91. Through this rung at the top of the car, is that what you are pointing to?

A. Yes, sir, this one, and sometimes the one on the side.

Q. 92. All right, sir. Now, Mr. Manns, how hard a lick would it take to knock that brake stick out of that grab iron if it had been put in there property?

A. It would take a pretty hard jerk to knock it out.

Q. 93. Now, where did you say Carl's stick and lantern ended up?

A. His lantern fell in front of the motor car, and his stick was down the track maybe six or eight—maybe ten feet farther.

Q. 94. Now, as I understand you, you say the lantern [fol. 529] hit in front of the motor car. Was that on another track?

A. Yes, sir.

Q. 95. After you put Carl in the motor car, as I understand you, what did you do?

A. I don't remember.

Q. 96. Do you know how Carl stayed in the motor car?

A. No, sir.

Q. 97. What was his apparent condition as to pain and his ability to get around at the time you saw him get in the motor car?

A. His leg was hurting and he couldn't get around good.

Q. 98. He couldn't get around good?

A. No, sir.

Q. 99. Was he complaining?

A. Yes, sir.

Mr. Sanders, Sr.: We object to that last question and move to strike it out, Your Honor.

Mr. Walter G. Burton: We think it is a part of the res gestae, Your Honor. It was certainly within thirty minutes.

The Court: I'll overrule it.

[fol. 530] To which action and ruling of the Court the defendant, by counsel, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 100. What was he complaining of, Mr. Manns?

Mr. Sanders, Sr.: Objection.
The Court: Overruled.

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

A. He was complaining with his hip and his leg.

Q. 101. Do you recall which hip and leg he was complaining of?

A. No, sir, I don't.

Q. 102. Did you see Carl Still any time that night later?

A. Yes, sir, when we went—when we ate lunch, ate out—took our noon—you know, lunch period.

Q. 103. Where was he?

A. He was in the shanty, the place where we change our clothes and eat at.

Q. 104. And where was he in that shanty?

A. He was laying on the bench.

Q. 105. Did he work any more that night, to your knowledge?

[fol. 531] A. No, sir.

Q. 106. Now, on the evenings prior—or after the time it is alleged Carl Still was injured, there is evidence that he went back down to the railroad on some of those evenings. Do you recall seeing him back down there any time after this night that it is alleged he was hurt?

A. Yes, sir.

Q. 107. On those nights that you saw him down there, did you see him do any work?

A. No, sir.

Q. 108. What was he doing?

A. Just sitting around.

Q. 109. What was his condition and ability to get around? That is, how did he walk? How did he move around?

A. He was hobbling.

Q. 110. What do you mean?

A. He was limping.

Q. 111. Did he have anything to help him get around with?

A. I don't remember.

Q. 112. You say, as I remember, Mr. Manns, that you had worked with Carl Still since 1951?

A. Yes, sir.

[fol. 532] Q. 113. Had you worked there in the Bluefield yards?

A. Yes, sir.

Q. 114. In a general way, Mr. Manns, what was his ability to perform his services there for the Norfolk and Western Railroad Company prior to the night of January 22nd and early morning of January 23rd, 1958?

A. It was good.

Q. 115. Did he ever have any trouble, to your knowledge, in climbing up and down cars, or handling the cars, or doing anything?

A. No, sir.

Q. 116. Who was the engineer there that night, Mr. Manns?

A. Davis is all I know—Engineer Davis.

Q. 117. Prior to January 22nd, 1958, and January 23rd, 1958, would you describe, please, sir, in a general way, the manner in which Mr. Davis handled trains that you were working on there?

A. Well, sometimes he would handle them rough, and other times just ordinarily.

Q. 118. Had you ever complained to any conductor about the manner in which he handled trains?

A. No, sir. I told him.

Q. 119. You told him yourself?

[fol. 533] A. Yes, sir.

Q. 120. Have you ever heard any of the others there complain to the conductors or complain to him about the manner in which he handled the trains?

A. Yes, sir.

Q. 121. Did you see Carl working there that night before he was injured, or it is alleged he was injured?

A. No, sir.

Q. 122. You don't remember seeing him working there that night?

A. No, sir.

Mr. Walter W. Burton to Counsel for the Defendant: You may inquire.

Cross-examination.

By Mr. Sanders, Sr.:

Q. 1. I believe you say you were standing there at about where the stove was when Still—when Carl Still got on this moving train?

A. Yes, sir.

Q. 2. You were standing right there about where the stove was?

A. Yes, sir, pretty close.

[fol. 534] Q. 3. And the train was moving slowly down toward the west. That was just a routine switching operation that was going on there, wasn't it?

A. Yes, sir.

Q. 4. Just a routine switching operation. The train was moving slowly towards the west and Still got on the last car while the train was in motion, is that rihgt?

A. I don't know. I can't recall that.

Q. 5. You don't know whether he got on while it was in motion or while it was stopped?

A. No, sir.

Q. 6. I thought that you previously—did you previously testify that he did get on while the train was moving? I am not sure that you did; I am just asking you.

A. I am not sure that I did. I don't remember.

Q. 7. Yes. But you were standing there and you did see Carl Still get on the train, did you?

A. I can't recall.

Q. 8. You don't know whether you saw him get on or not?

A. I just seen him on it.

Q. 9. All right. Now, where—when you saw him—when you first saw Carl on the car, was the train moving then?

[fol. 535] A. Yes, sir.

Q. 10. The train was moving slowly in a westerly direction, wasn't it?

A. Yes, sir.

Q. 11. And he was up on the brake step on the east end of the last car?

A. Yes, sir.

Q. 12. And where was this car that Carl was on with reference to your stove—to the stove that you were standing by—just across the track from you?

A. Yes, sir.

Q. 13. And then somebody cut this car off, didn't they?

A. Yes, sir.

Q. 14. They cut the car off while the train was moving slowly in a westerly direction?

A. (The witness made no reply to the foregoing question.)

Q. 15. Isn't that right?

A. I don't know whether it was moving when they cut it off or not, but I know they cut it off.

Q. 16. Well, when you first saw Carl on the train and it was moving westwardly, the car hadn't been cut off then, had it?

[fol. 536] A. Yes, sir.

Q. 17. It had been cut off?

A. Yes, sir.

Q. 18. And it was moving—it had already been cut off and it was just about opposite the point where you were standing down there near the stove, is that right?

A. Yes, sir.

Q. 19. And the train was following on behind it, is that right?

A. Yes, sir.

Q. 20. And then the train—you saw the train begin to catch up with the car that Carl was on, didn't you?

A. Yes, sir.

Q. 21. And then you ran over to try to keep the train from coupling up to that car, right?

A. Yes, sir.

Q. 22. Now, you were asked by Mr. Burton why you went over to try to prevent the cars from coupling, and you first said that you were trying to keep from delaying the movement of the cars?

A. Yes, sir.

Q. 23. Was that the reason?

A. Yes, sir.

[fol. 537] Q. 24. In other words, if the cars—if the train had coupled up to the car, you would have had to stop the train, or it would have delayed the movement in some way in order to uncouple that car, is that right?

A. Yes, sir.

Q. 25. That's the real reason you ran out there and tried to prevent the coupling, isn't it?

A. That's right.

Q. 26. It didn't even occur to you at that time that Carl was in any danger of being hurt, did it?

A. No, sir.

Q. 27. And the reason you went down was to keep it from coupling up, and somebody would have to go in there and uncouple and delay the movement of the train; that's right, isn't it, Harry?

A. Yes, sir.

Q. But you got down there just a little bit too late to prevent the coupling, is that right?

A. Yes, sir.

Q. 29. Did you get in between the cars?

A. No, sir.

Q. 30. You don't have to go in between them——

A. No, sir.

[fol. 538] Q. 31. (Continuing)—to work the coupling apparatus?

A. No, sir.

Q. 32. You got down nearly to the cars, but they coupled before you got there?

A. Yes, sir.

Q. 33. At the time you looked up and saw Carl still riding this car down the track to the west and you saw the train catching up with it, how far was the train from the car—about six or eight feet?

A. Approximately.

Q. 34. Six or eight feet. And was gradually catching up with it?

A. Yes, sir.

Q. 35. And you thought that you could get down there before the train did couple up to the car to prevent the coupling?

A. Yes, sir.

Q. 36. You didn't want to delay the movement there?

A. Yes, sir.

Q. 37. And it never occurred to you that when the cars coupled that Carl was liable to get hurt, did it?

A. (The witness made no reply to the foregoing question.)

[fol. 539] Q. 38. You never gave that a thought?

Mr. Walter G. Burton: Let him answer the question.

Upon request, the reporter read from the record as follows:

The Reporter: (Reading from the record) "Question: And it never occurred to you that when the cars coupled that Carl was liable to get hurt, did it?" There was no reply to that question.

A. Well, I haven't answered that yet. You know, on the railroad we always try to prevent things to keep down accidents and prevent the movement—delay of the train.

Q. 39. Yes, but I say at the time you ran down there to try to prevent the coupling, you were trying to not delay the movement of the train; it didn't occur to you that Carl was in any danger of getting hurt, did it, at that time?

A. No, sir.

Q. 40. Then, you say the train coupled to the car and just at the instant that it coupled, the brake stick and the light fell off, is that right?

A. No, sir. At the instant they coupled, they jerked. That's what knocked the brake stick and light off.

[fol. 540] Q. 41. Well, did—when did the jerk occur—just at the moment it coupled?

A. Just at the moment it coupled.

Q. 42. Just at the moment it coupled. In other words, the coupling and—the coupling and the jerking were almost simultaneous, is that right?

A. Yes, sir.

Q. 43. And that's when the brake stick and the lantern fell off?

A. Yes, sir.

Q. 44. In your experience on the railroad, Harry, you have often seen the brakemen's lanterns and brake stick fall off cars, haven't you?

A. Quite a bit.

Q. 45 That happens often in the railroad yard in switching operations, doesn't it?

A. Yes, sir.

Q. 46. Then you weren't looking up at Carl Still when the train stopped, were you? Or were you? Was he still standing up on the brake step when the train stopped? You looked up there, didn't you?

A. He was either standing or hanging up there. He was up there.

[fol. 541] Q. 47. He was up there?

A. Yes, sir.

Q. 48. Well, was he standing or hanging? Wasn't he standing on the brake step?

A. I didn't notice that. He was up there.

Q. 49. He was up there on the brake step and you didn't notice his exact position then?

A. No, sir.

Q. 50. And then after the train stopped, he climbed down off of the car?

A. I didn't see him climb down.

Q. 51. Well, you were right there, weren't you?

A. I was getting his light and stick.

Q. 52. Did you help him down off the car?

A. No, sir.

Q. 53. Did you see anyone else help him down off the car?

A. No, sir.

Q. 54. Who was there at the time you were picking up the lantern and the stick?

A. I don't know.

Q. 55. That didn't take long, did it?

A. Well, the light was kind of under the front end [fol. 542] of the motor car; you know, I had to stoop down and get it. And then I shined the light around trying to find the stick; so it took just, you know, a little time to find that.

Q. 56. And by the time you found the lamp and the stick, Carl was down on the ground?

A. Yes, sir.

Q. 57. And you didn't see anybody help him down?

A. No, sir.

Q. 58. Now, Carl, very often—I mean Harry—very often you have coupling operations of the same kind on the railroad, don't you?

A. Yes, sir.

Q. 59. And it frequently happens that when a car is cut off, that the train will overtake it and couple again, isn't that right?

A. Yes, sir.

Q. 60. And you brakemen naturally expect that when working on the railroad, don't you?

A. Yes, sir, because sometime the cars break off and catch up like that——

Q. 61. That's right.

A. (Continuing)—and it's dangerous.

Q. 62. And this wasn't anything unusual, this thing that [fol. 543] happened this particular night, was it?

A. No, sir, not——

Q. 63. And you men are instructed when you go to work on the railroad and in your training that in riding a car like this that is being followed by a train, to keep a watch in the front and to the rear, too, don't you?

A. Yes, sir.

Q. 64. You look both ways at all times and attempt to protect yourself, isn't that right?

A. Yes, sir.

Q. 65. Which way was Carl looking as he was going down the track with this train following him, do you know?

A. No, sir, I don't.

Q. 66. Which way was he facing?

A. He was facing west.

Q. 67. He wasn't looking behind him, then?

A. I don't know.

Q. 68. Well, if he was facing west——

A. I mean the way you stand on the brake step, you are facing west.

Q. 69. Facing West?

A. Yes.

Q. 70. How far did the train go after the train coupled [fol. 544] up to the car?

A. Well, it stopped immediately.

Q. 71. Stopped immediately. You say, Harry, that the first thing you did after you found you couldn't prevent the coupling was to look for the brake stick and the lantern?

A. We are accustomed to doing that, hand it back to the brakeman.

Q. 72. And it didn't occur to you at that time that Carl Still had been injured, did it?

A. Well, I don't know, because I asked him if he was hurt and he didn't say anything.

Q. 73. But I say, at the time you were looking for the brake stick and the lantern, it didn't occur to you he might be hurt, did it?

A. No, sir.

Q. 74. If it had occurred to you, you would have gone to him, wouldn't you, instead of looking for the lantern

and stick? You would have tried to help him, wouldn't you?

A. Yes, sir.

Mr. Sanders, Sr.: That's all.

Re-direct examination.

[fol. 545] By Mr. Walter W. Burton:

Q. 1. Mr. Manns, is it usual for a car that has been cut off that has started rolling westward, and when it is re-coupled to a train, is that a usual operation?

A. No, sir.

Q. 2. Is it usual that one of these cars, when it does re-couple, is, as you described, severely jerked? Is that usual?

A. When the engine is a-hold of the cars, it is, because it's a hard jerk.

Q. 3. No; I say, after it has been cut loose is it usual that that cut-loose car will be severely jerked?

A. Do you mean when it is coupled back up?

Q. 4. Yes.

A. Yes, sir.

Q. 5. And that happens all the time?

A. Not all the time, not hard as it did that night.

Q. 6. Then you would say this was harder than usual?

A. No, sir.

Mr. Sanders, Sr.: We object to him cross-examining his own witness, Your Honor. He has answered it and covered——

Mr. Walter G. Burton: That is not cross-examin-[fols. 546-562]ing.

Mr. Sanders, Sr.: He is asking leading questions, too.

The Court: I'll sustain the objection to the question.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

Mr. Walter W. Burton: That's all.

Mr. Walter G. Burton to the Witness: You are excused.

The Witness: My cap is in there (indicating the witness room).

Mr. Walter G. Burton to the Witness: You go right ahead and get it.

Witness stands aside.

GEORGE A. SAUNDERS, JR., another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

* * * * * * *

[fols. 563-567] Q. 49. What was the color of the signal at the time Carl was cut loose?

A. Well, where I was standing, I couldn't see it. Standing up close to the cars, you could not see the signal.

Q. 50. At the time he was cut loose, you don't know what color the signal was?

A. No.

Q. 51. Approximately how far did Carl travel after he had been cut loose before the train recoupled to him?

A. Well, I'll say at least a half a car or a car length after I left him and started back.

* * * * * * *

[fols. 568-569] Cross-examination.

By Mr. Sanders, Sr.:

* * * * * * *

[fol. 570] Q. 12. Did you see Carl when he got up on the car to ride it down and take it down on the classification track?

A. Yes, I did.

Q. 13. You saw him get up there?

A. Yes.

Q. 14. Was the train moving at that time, at the time he got on the car?

A. I don't recall if it was or not.

Q. 14. Well, you cut it off, though, did you?

A. Yes, I cut it off.

[fol. 571] Q. 16. Well, the train was moving when you cut it off, wasn't it?

A. Yes, the train was moving when I cut it off.

Q. 17. It was moving slowly westwardly?

A. It was moving westwardly.

Q. 18. And you went in and cut it off, and then the car that Carl was on drifted on down towards the west?

A. That's right.

Q. 19. And the train followed it and gradually caught up with it,——

A. Yes, sir.

Q. 20. (Continuing)—is that right?

A. That's right.

Q. 21. How far did this car that Carl Still was on—how far did it go after it was cut off before the train caught up with it and coupled, would you say?

A. Well, I will say it was—run about a half a car or car-length when I turned my back. I don't know how far after that, after I "heared" the noise.

Q. 22. And, then, what next attracted your attention?

A. The noise.

Q. 23. Was that when the cars coupled?

A. Yes.

Q. 24. When they coupled. And, then, what, if anything, did you do when you heard the noise of the coupling?

A. I just turned to look down westward.

[fol. 572] Q. 25. What did you see?

A. Well, I didn't see nothing at the time.

• • • • • • •

[fols. 573-583] Q. Now, isn't it a fact, George, that you did see him standing up on the brake-step when the train stopped and that you did see him climb down off the car unassisted?

A. No, I did not.

Q. 34. You didn't do that?

A. No.

Q. 35. Did you hear the noise of the slack running out of the train when the train stopped?

A. Well, I'll tell you the way it was; I cut him off and I walked back. The cars were gradually moving. Then I "heared" this unusual noise and I just looked around—just usual procedure; we do that.

Q. 36. But you are positive that when the train stopped, that you didn't see him standing up on the brake-step and you didn't see him climb down off of the car?

A. No, I did not.

• • • • • • •

[fol. 584] W. R. Webb, another witness introduced on behalf of the plaintiff for a limited purpose, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Walter G. Burton:

* * * * * * *

[fol. 585] Q. 9. Were you such assistant yardmaster on the night and morning of January 23rd, 1958?

A. I was.

* * * * * * *

Q. 12. I hand you here a paper, Mr. Webb. What is that paper, please, sir?

A. That's a C. T. 37, sir.

Q. 13. In railroad parlance, or language, what is it?

A. It's a report of a personal injury.

* * * * * * *

[fols. 586-588] Q. 16. When did you write it?

A. Just a few minutes after the accident occurred.

Q. 17. That is the night of January 23rd, 1958?

A. That's right, sir.

* * * * * * *

[fol. 589] Mr. Walter G. Burton: (Reading from Plaintiff's Exhibit No. 17) "Norfolk and Western Railway Company. Telegraphic Personal Injury Report. Form C. T. 37-T. P. C. Wingo—Supt.—Pocahontas Div. Dated 1-23-58.

"Name of person injured—A—Carl Still.

"Social Security Number—B—233-405717.

"Occupation—C—Yard Brakeman.

"Age—D—31.

"Color—F—Colored.

"Residence—G—Bluefield, West Virginia.

[fol. 590] "Destination—Riding shop car—AG—into Track No. 10 W yd classification yard.

"Employee, Passenger, Highway Traveler, or other.

H—Employee.

"If employee, was he actually on duty when injured?

J—On duty.

"Place of accident—K—West Yard, Bluefield.

"Date of accident—M—1-23-58.

"Time—N—12:30——

The Witness: A.m., sir.

Mr. Walter G. Burton: Well, there's a little "a" there, but I don't see the "m."

The Witness: After midnight; 12:30 a.m., sir.

Mr. Walter G. Burton: (Continuing)

"Train number 1115 p West 7AAO—

At this point, Mr. Walter G. Burton showed Plaintiff's Exhibit No. 17 to the witness, pointing to a place thereon.

Mr. Walter G. Burton to theWitness: If I miss this, you tell me.

The Witness: (Reading from Plaintiff's Exhibit No. 17) [fol. 591] "11:15 p.m. West Yard crew."

Mr. Walter G. Burton to the Witness: O.k. Will you read that line there from "Q," please, sir?

The Witness: Yes, sir. It was:

"11:15 p.m. West Yard crew. Engine 2077—Conductor Taylor—Engineer Davis."

Mr. Walter G. Burton to the Witness: Thank you, sir.

Mr. Walter G. Burton: (Continuing to read from Plaintiff's Exhibit No. 17):

"Nature and extent of injury—R—Left hip bruised and thigh.

"If employee, give estimated disability." Under "S" is blank.

"Disposition made of injured person"—

blank. Under "U"—

"Continued to work.

"If person is seriously injured or killed, give name and address of nearest relative. V—Not serious.

"What was said by injured person as to cause of accident and extent of injuries? W—Was classifying

69 cars on lead. Brakeman Still was on N. & W. 11878 going into Track——

Mr. Walter G. Burton to the Witness: What's that word right there?

The Witness: "No. 10," sir.

[fol. 592] Mr. Walter G. Burton to the Witness: Thank you, sir.

Mr. Walter G. Burton: (Continuing to read from Plaintiff's Exhibit No. 17):

"—No. 10. Car was cut off. Cars behind car that Still was riding coupled up on lead knocking him against car—Brake on east end of car.

"Give names and addresses of witnesses to accident."

Under "X" is:

"H. S. Manns—Condr. Taylor—Jr. Bratton, G. A. Saunders—A. Brown.

"If the injury was the result of defective tools, machinery, engines, cars or property owned or controlled by the Company, give report and disposition here. Y—Inspected by my——

Mr. Walter G. Burton to the Witness: Or is that "Mr. Combs"?

The Witness: That's right, sir.

Mr. Walter G. Burton: (Continuing to read from Plaintiff's Exhibit No. 17):

"—Car in OK condition. All safety appliances OK.

"Remarks: Give full particulars as to how accident occurred, including speed of train. Z—West Yard crew [fols. 593-596] was classifying cars on lead. Brakeman Still was riding 11878 which was going into Track No. 10 classification yard—Cars behind him coupled knocking him up against side of car bruising left hip and thigh.

"(Signed) B. G. Lilly."

• • • • • • •

[fol. 597] RONALD JONES, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

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Q. 4. On the night of January 22nd and early morning of January 23rd, 1958, what was your occupation?

A. Yard brakeman on the Bluefield yard.

• • • • • • •

[fol. 598] Q. 11. When did you see Carl Still that night?

A. It was sometime after the accident occurred. I don't know exactly when it was, but it was after the accident had occurred.

Q. 12. Where was he?

A. He was in the colored shanty. He was coming out of the colored shanty.

• • • • • • •

Q. 14. Did you lend him any aid or assistance there that night?

A. I did, but I don't remember in what form I did help [fols. 599-636] him; but I remember helping him.

Q. 15. What was his condition there in regard to his ability to walk and to get around?

A. Well, he was walking with a limp.

• • • • • • •

[fol. 637] JAMES POWELL DAVIS, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

• • • • • • •

[fol. 638] Q. 6. On and a short time after January 22nd-23rd, of 1958, were you working for the Norfolk and Western Railroad Company?

A. Yes, sir.

Q. 7. What position were you holding at that time?

A. I was working a timekeeper clerk's job.

• • • • • • •

[fol. 639] Q. 15. Prior to that time, did the Railroad have a policy of what was called on the railroad "light work"?

A. Yes, sir.

Q. 16. And what did that consist of, Mr. Davis?

A. Well, that consisted of a man that had received an injury, or a sprained ankle, or maybe a pulled muscle or tendon, or something, and he was unable to perform a regular duty that required braking services or something of that nature.

• • • • • • •

Q. 18. What would Mr. B. G. Lilly, the terminal trainmaster, tell them to do?

• • • • • • •

[fol. 640] A. I don't believe that he told them to do anything other than they could come to the conductor that was running the crew on the particular day and report to him, and maybe not perform any duties at all.

• • • • • • •

Q. 20. Now, is there a system over there in regard to when brakesmen work known as the "mark-off system"?

A. That's right.

Q. 21. What does that mean, Mr. Davis?

A. Well, that means that an employee that works the extra list or holds a regular, assigned position, that whenever he desires not to work, that he can mark off from duty.

• • • • • • •

Q. 23. A short time after January 23rd, 1959, did the terminal trainmaster, B. G. Lilly, give you any instructions in regard to Carl Still?

A. He never gave me any definite instructions.

Q. 24. What did he tell you in regard to Carl Still?

[fol. 641] A. Well, he never told me anything, other than I had a memorandum from his office.

Q. 25. And what did that memorandum say?

A. To not mark Carl Still off without permission from the terminal trainmaster's office.

• • • • • • •

Q. 28. Did Carl Still attempt to mark off?

A. Yes, he did.

• • • • • • •

[fols. 642-643] Q. 32. And what did you tell him?

A. I told him I couldn't mark him off until he received permission from the terminal trainmaster.

Q. 33. Is it the general practice over there to require the terminal trainmaster, Mr. B. G. Lilly's permission before any man can mark off?

A. No, sir.

• • • • • • •

Cross-examination.

By Mr. Sanders, Sr.:

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[fol. 644] Q. 18. I see. Now, you mentioned this "light work" policy that they have down there. What was that [fols. 645-659] policy again, now, Mr. Davis, this "light work" policy?

A. That policy comes from where maybe that a man would receive an injury, or a sprained ankle, or pulled muscle, or something of that nature, and unable to perform his regular duties as a brakeman.

Q. 19. And in certain cases the Company will let him stay down there without working and continue to carry him and pay him?

A. That's right.

Q. 20. That's for the accommodation of the employee, isn't it?

A. Well, I guess you could term it as that.

Q. 21. So, he was carried on the payroll even though he was unable to perform his work, right?

A. Right.

Q. 22. And they often do that?

A. They do.

Q. 23. For their employees?

A. That's right.

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[fol. 660] William Warren Peck, another witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

[fol. 661] Q. 4. What is your occupation?

A. Motor car operator.

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[fol. 662] Q. 12. Well, do you recall the night that it is alleged Carl Still was injured there?

A. Yes, sir.

• • • • • • •

[fol. 663] Q. 21. What did you see there in regard to this accident? What happened, Mr. Peck?

A. Well, I had brought a load of men out of the yard to discharge them at the conductor's stand, and just as soon

as they got out of the motor car, I had started back down to the lower yard, and, of course, I hadn't gone very far when I heard a tremendous noise, I suppose you would call it, which was probably slack action; and then something hit the side of the motor car.

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[fol. 664] Q. 24. And what was it?

A. It was a lantern such as you have right there (indicating).

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Q. 26. Is there a considerable noise going on in that yard?

A. Well, actually, it would depend on what you would determine "a considerable noise." If you worked there over a period of time, the normal noise, you don't consider it "considerable," actually; and unless there would be an unusual noise, you don't pay any attention to it.

Q. 27. Well, was this an unusual noise?

A. Yes, it was.

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[fol. 665] Q. 35. To your best recollection, he did get on the motor car?

A. That's right.

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[fol. 666] Q. 37. What was his ability there to get around? That is, how was he moving around? Was he walking all right, or how was he moving?

A. What do you mean—before or after?

Q. 38. At the time he started to get in the motor car.

A. No, the best I remember, someone helped him.

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[fol. 667] Cross-examination.

By Mr. Sanders, Sr.:

Q. 1. What was this tremendous noise that you heard, Mr. Peck?

A. It was slack action.

Q. 2. The slack running out?

A. Well, in or out.

Q. 3. Sir?

A. It was either runnning in or out. I would say it was slack action.

Q. 4. Slack action?

A. Yes, sir.

[fols. 668-686] Q. 5. There are two kinds—when it runs in or runs out?

A. That's right.

Q. 6. Did that slack action come from the head of the train?

A. That I really couldn't remember.

Q. 7. You don't know where it come from?

A. No, sir.

Q. 8. This was slack action you heard?

A. That's right.

Q. 9. How did you express it again?

A. Well, I think I used the adjective, "tremendous" noise.

Q. 10. It was slack action that you heard?

A. That's right.

Q. 11. You didn't hear the cars when they coupled, then, did you?

A. Well, I couldn't determine, actually, whether there was a coupling or not.

Q. 12. But you didn't hear any coupling being made before you heard the slack action, did you?

A. No.

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[fol. 687] CARL STILL, the plaintiff herein, introduced as a witness on his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

Q. 1. What is your name, please?
A. Carl Still.
Q. 2. How old are you, Carl?
A. Thirty-three.
Q. 3. When and where were you born?
A. Arista, West Virginia, in Mercer County, May 17th, 1926.
Q. 4. What education do you have, Carl?
A. I completed the eighth grade.
Q. 5. Have you ever had any training or education to perform any work other than as a laborer?
A. No, sir.
Q. 6. Have you ever worked in any position other than as a laborer?
A. No, sir.
Q. 7. Were you ever in the Army?
A. Yes, sir.
Q. 8. When were you in the Army?
A. I went to the Army July 18th, 1945.
[fol. 688] Q. 9. And when did you get out?
A. I got out January 31st, 1946.
Q. 10. What type of a discharge did you receive?
A. C.D.D.
Q. 11. What does that mean?
A. It's a Certificate of Disability for Discharge.
Q. 12. Was it an honorable discharge?
A. Yes, sir.
Q. 13. Why did you get a military discharge, if you know?
A. I had trouble with my side.
Q. 14. With your side?
A. Yes, sir.
Q. 15. Had you ever had any trouble with your side prior to that time?
A. Yes, sir.

Q. 16. What was that?

A. I got my side hurt in an automobile accident.

Q. 17. And when was that, if you can recall?

A. I don't know the exact date.

Q. 18. What was the injury that you received at that time, if you know, Carl?

A. I understand my ribs was broke.

Q. 19. Now, after you got out of the Army where did you go to work?

A. The first job I got—no—I went to work at Mont- [fol. 689] gomery Ward, and I went to a mechanic's school on Bluefield Avenue.

Q. 20. And what were you doing for Montgomery Ward?

A. I was a janitor.

Q. 21. Did you receive a military pension?

A. Yes, sir.

Q. 22. How much was that pension?

A. Eleven-fifty.

Q. 23. And how long did you receive it, if you recall?

A. Up until during the summer of '48. I don't know the exact date.

Q. 24. And was that eleven-fifty per month?

A. Yes, sir.

Q. 25. Where did you go to work after you left Montgomery Ward's?

A. Peerless Coal and Coke Company, Vivian, West Virginia.

Q. 26. What did you do for them?

A. A brakeman in the coal mines.

Q. 27. When was that, if you can recall, Carl?

A. It was about the middle of 1948.

Q. 28. Would you describe in a general way, please, what the duties of a brakeman in the mines are?

A. I was a brakeman behind a loading machine in the mines.

Q. 29. And what is a loading machine?

[fol. 690] A. That's a machine that loads the coal to bring outside.

Q. 30. Loads the coal into the coal cars?

A. Into the mining coal cars.

Q. 31. The small mining coal cars?

A. Yes, sir.

Mr. Walter G. urton to the Witness: Go ahead.

A. (Continuing) Well, we would—the brakeman, his job consisted of—sometime we would help lay track and dust the cut.

Q. 32. Now Carl, intermittently throughout the trial you have been getting up and walking around. Why have you done that?

A. Well, I begin to get numb like when I sit down too long, or stand up too long, or lay down too long, or anything.

Q. 33. All right; if you start getting that way up there, just ask me to stop, and we will try to stop.

A. Yes, sir.

Q. 34. How long did you work for Peerless Coal and Coke Company at Kimball?

A. I worked for them from '48 until '51 when I got the job on the railroad.

Q. 35. Until '51?

A. Yes, sir.

Q. 36. You say you went to work for the Railroad Com-
[fol. 691] pany then?

A. Yes, sir.

Q. 37. When did you go to work for the Norfolk and Western Railroad Company, if you can recall?

A. July 24th, 1951.

Q. 38. Was it necessary for you to have a physical examination before you started to work?

A. Yes, sir.

Q. 39. Who gave you that physical examination, if you can recall?

A. Dr. Troup. Dr. Troup.

Q. 40. And who does he work for?

A. Norfolk and Western Railroad.

Q. 41. And where are his offices located?

A. In the division office there in Bluefield.

Q. 42. Do you recall when you received that examination?

A. 1951.

Q. 43. Carl, did you fill out any cards there or anything of that nature that you recall?

A. No, sir.

Q. 44. Do you recall signing any papers when you applied for work?

A. Oh, we have to probably sign a bunch of papers. I don't know exactly what I signed. But the regular procedure in getting a job, they will give you some papers to [fol. 692] sign—insurance, different things; I don't recall now.

Q. 45. Well, did you pass the physical examination?

A. Yes, sir.

Q. 46. Prior to the time that you went to work for the Railroad, did you have any trouble getting around doing physical labor?

A. No, sir.

Q. 47. Did you have any trouble working in the mines?

A. No. sir. The mines is about three times as hard as the railroad, and I didn't have no trouble down there.

Q. 48. What did you have so much harder than what you had to do with the Railroad?

A. It's just heavier work, harder work, in the mines than it is on the railroad. In the mines you have got to pull them track around coal about five foot. By the time you get your timber and everything set, you have got about four foot maybe.

Q. 49. How much would one of those timbers weigh?

A. Timbers is different weights. Some weigh maybe forty or fifty pounds.

Q. 50. Could you handle those all right?

A. Yes, sir.

Q. 51. Where did you start to work for the Norfolk and Western?

A. The Bluefield yard.

Q. 52. How long did you work for the Norfolk and [fol. 693] Western?

A. I worked for the Norfolk and Western—'51 up until October of '56, and I was cut off, and I got my job back in November of '57.

Q. 53. Why did you get cut off in October, 1956?

A. There was two of us, me and another boy, Jack Miles, we were dismissed for deserting the crew.

Q. 54. And who dismissed you?

A. As far as I know, Mr. Lilly.

Q. 55. And who is Mr. Lilly?

A. Our terminal trainmaster.

Q. 56. What are his duties over there, that you understand them to be? What does he do over there?

A. The way I understand, he is just the boss of all of us.

Q. 57. He is over the whole yard, so far as you know?

A. Yes, over the whole terminal.

Q. 58. Did you have any trouble performing your duties as a brakesman physically from 1951 until the time you were dismissed in 1956?

A. No, sir.

Q. 59. In a general way, what did you have to do, Carl, as a brakesman?

A. You have to ride cars from one track to another, and throw switches at different times. Generally, our job was to do what the conductor tell us. That's my boss.

[fol. 694] Q. 60. Is it necessary for you to get on and off cars?

A. Yes, sir.

Q. 61. Both moving and stationary cars?

A. Yes, sir.

Q. 62. Did you ever have any difficulty in doing that?

A. No, sir.

Q. 63. Now, at the time you were dismissed in 1956, you say that Mr. Lilly discharged you for deserting the crew?

A. Yes, sir.

Q. 64. Did he explain to you at that time why he was doing that?

Mr. Sanders, Sr.: Your Honor, we want to object to this because we are not trying the question of whether his discharge was justified or unjustified. We want to object to this matter.

Mr. Walter W. Burton: We'll withdraw the question.

Mr. Sanders, Sr.: All right.

The Court: All right.

By Mr. Walter W. Burton (Continuing):

Q. 65. Did you—after October of 1956, did you return to work for the Railroad Company?

A. I returned to work November of '57.

Q. 66. Was it necessary for you to take a physical [fol. 695] examination when you returned to work in 1957?

A. Yes, sir.

Q. 67. And what date in '57 did you return to work, if you recall?

A. I don't know the date, but it was in November.

Q. 68. And who gave you that physical?

A. Dr. Troup.

Q. 69. And, as I recall, you say he's the Norfolk and Western doctor?

A. Yes, sir.

Q. 70. Did you pass that physical?

A. Yes, sir.

Q. 71. From November, 1957, until the early morning of January 23rd, 1958, did you at any time have any difficulty in physically doing your work over there?

A. No, sir.

Q. 72. Did your back give you any trouble?

A. No, sir.

Q. 73. Did your back give you any trouble during the entire time you were working for the Norfolk and Western?

A. No, sir,

Q. 74. What kind of a brakesman were you, Carl?

A. Yard brakeman—is that what you mean?

Q. 75. Yes, sir.

A. Yes, sir, a yard brakeman.

Q. 76. And what is the distinction between a yard brakes-[fol. 686] man and any other kind of a brakeman?

A. Well, a yard brakeman works within the terminal; that's the Bluefield yard. He don't go out on the road or anything. Our job is on the yard.

Q. 77. You stay there in the yard; you don't go out on trips?

A. No, sir.

Q. 78. Do the tracks in the Bluefield yards run generally in an east and west direction?

A. Yes, sir.

Q. 79. How are these trains made up? How are these switching operations carried out?

A. The trains—they are carried out the way the conductor wants them carried out.

Q. 80. How are they made up? Where do they get all these cars from?

A. Some come in from Norton, Radford, Williamson, Roanoke, different places, and they classify them there and send them out where they want them to go.

Q. 81. There has been evidence introduced here, Carl, that there is a hump there dividing the East and West Yards; is that correct?

A. Yes, sir.

Q. 82. And from that hump cars would roll west of their own volition or east of their own volition; is that correct? [fol. 697] A. Yes, sir.

Q. 83. And that hump is a dividing line between the East and the West Yards; is that correct?

A. Yes, sir.

Q. 84. On the night of January 23rd, 1958, what time did you report to work—or not on the night of January 23rd—on the night of January 22nd, what time did you report for work?

A. At eleven-fifteen.

Q. 85. And where did you report?

A. The West Yard.

Q. 86. And at what place in the West Yard did you report?

A. Report to the shanty.

Q. 87. Is that the shanty that appears in Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. 88. Is this it right here, the corner of it?

A. I was to report to my shanty down here. This is the yard office up here (indicating).

Q. 89. All right, sir. And this shanty also appears in Plaintiff's Exhibit No. 4. Is that the building shown in that picture?

A. Yes, sir.

Q. 90. Who did you report to there, Carl, if anyone?

A. We report to the shanty, and the conductor comes [fol. 698] in and called off our names and sees if everyone was there and check how long you had been off from work.

Q. 91. What time did you actually start to work that evening?

A. Eleven-fifteen.

Q. 92. Who was the conductor, if you recall?

A. Conductor Thomas A. Taylor, Jr.

Q. 93. And what are his duties there?

A. What are conductor's duties?

Q. 94. Yes. What does he do?

A. He is the one that runs the crew, classifies the trains, and tells us where to take the cars to and what they want done.

Q. 95. Then he serves as your boss there?

A. Yes, sir.

Q. 96. The boss over the brakesmen?

A. Yes, sir.

Q. 97. On this particular night—that is, January 22nd, 1958—who gave you and the other brakesmen that night your orders?

A. Our conductor.

Q. 98. And who was that?

A. Thomas A. Taylor, Jr.

Q. 99. In a general way, is the conductor, Mr. Taylor, in charge of these switching operations?

A. Yes, sir.

[fol. 689] Q. 100. Who were some of the other brakesmen working there that night, if you can recall?

A. There was Bratton, Palmer, Manns, Brown, Parham, Jones.

Q. 101. Approximately how many were there, if you can recall?

A. Why, I think we had about a twelve or fourteen-man crew that night; I am not sure.

Q. 102. Did you receive an injury while you were working there that night?

A. I did.

Q. 103. Immediately before you were injured was there a string of cars located on the—on what is known as the lead track?

A. There was.

Q. 104. And was there an engine attached to the east end of that string of cars?

A. Yes, sir.

Q. 105. And is it not true that you were cutting cars off of the west end of that string and taking them into the individual tracks?

A. Yes, sir.

Q. 106. Approximately how many cars were there in that string?

[fol. 700] A. I don't know the exact amount, but I think there was around forty—forty-five—maybe fifty; I don't know exactly how many there was.

Q. 107. Who was the engineer that night, if you can recall?

A. Mr. Davis.

Q. 108. Carl, there has been evidence introduced here that there were three signals located in the West Yard that were controlled by the conductor; is that correct?

A. Yes, sir.

Q. 109. Looking now at Plaintiff's Exhibit No. 7, is that locomotive located on what is known as the "lead track"?

A. Yes, sir.

Q. 110. Now, west of this locomotive, there seems to be a number of tracks going off of the track upon which the locomotive is situated; is that correct?

A. Yes, sir.

Q. 111. Now, as I understand it, after a car had been cut off you rode it into one of these tracks?

A. Yes, sir.

Q. 112. Who told you which one of those tracks it would go into?

A. Our conductor.

Q. 113. How would you get into that track? That is, how [fol. 701] would you take the car in there?

A. We would give a signal to the switchman which track we are going to.

Q. 114. And how do you give those signals, Carl?

A. That night we give a signal with our light. In the daytime we give a signal with our hand.

Q. 115. Immediately before you were injured, were you brakesmen engaged in this separating operation—that is, cutting cars off this train?

A. Yes, sir.

Q. 116. There has also been evidence introduced in this case that the conductor stands beside a stove that is shown in Plaintiff's Exhibit No. 1. Is this the place that the conductor stands?

A. Yes, sir.

Q. 117. Where the two men are standing in this picture?

A. Yes, sir.

Q. 118. Why does the conductor stand there?

A. He stands there so he can operate the board to keep in touch with the engineer so he will know when to move the train the way he want it moved.

Q. 119. Then, as I understand you, he gives the engineer instructions as to how to move this train?

A. Yes, sir.

[fol. 702] Q. 120. How does he do that, Carl?

A. He have a switch lever there on his little stand there beside the stove where he can operate the boards, and whichever way he want the engineer to go, that's the way he turned the light.

Q. 121. How many signals will this signal board indicate?

A. Three.

Q. 122. And what are those three signals, please, sir?

A. Well, he have a red signal to stop, and he have a flashing yellow signal to go off and on to pull back eastward,——

Q. 123. Yes, sir.

A. (Continuing)—and he have a yellow signal stay yellow to push westward.

Q. 124. To push westward?

A. Yes, sir.

Q. 125. How many different signal lights can the conductor control from the board that's located next to that stove?

A. Three.

Q. 126. And where are those three located?

A. There is one on the Allen Street bridge, and there is one just east of the Easley bridge, and there is one west of the West Yard office.

Q. 127. Then, all of them are located just east of where he is standing; there is one located there just shortly east of [fol. 703] where he is standing, and then on further up—east—the yard from where he is standing?

A. Yes, sir.

Q. 128. When you reported to work that night, were you furnished with any equipment?

A. We are furnished with our light when we get our job, and we keep that light.

Q. 129. I hand you here what purports to be a light. What is that, please, sir?

A. That's my lantern.

Q. 130. Is this your lantern?

A. Yes, sir.

Mr. Walter W. Burton to Mr. Sanders, Sr.:

Do you want to look at this, Mr. —

Mr. Sanders, Sr., shook his head negatively.

Q. 131. Did you have this lantern with you that night?

A. No, sir, I didn't have that one, but I had one just like that one.

Q. 132. You had one similar to this one?

A. Yes, sir.

Q. 133. Do you know what happened to the one that you had?

A. I don't know, unless it's in my car.

[fol. 704] Mr. Walter W. Burton: Your Honor, we want to introduce this lantern in evidence.

The Court: It may be introduced.

Mr. Sanders, Sr.: No objection.

The lantern, identified by the witness, was thereupon offered in evidence by the plaintiff, and the same was introduced, filed, marked:

"Plaintiff's Exhibit No. 18. 10-7-59 N.V.H."

and due to the nature of the exhibit introduced, it is filed separate and apart from this transcript.

By Mr. Walter W. Burton (Continuing):

Q. 134. Were you furnished with any other equipment there that night, Mr. Still?

A. We were furnished with a brake stick, a lantern, and a switch key.

Q. 135. I hand you what purports to be a shillalah, or a stick of some kind. What is that, please, sir?

A. That is a brake stick.

Q. 136. Is this the brake stick that you were given there that night?

A. Not that one, but one like that one.

[fol. 705] Q. 137. Was it like this one?

A. Yes, sir.

Mr. Walter W. Burton: We want to introduce this into evidence, too.

The Court: It may be introduced.

The brake stick, identified by the witness, was thereupon offered in evidence by the plaintiff, and the same was introduced, filed, marked:

"Plaintiff's Exhibit No. 19. 10-7-59 N.V.H."

and due to the nature of the exhibit introduced, it is filed separate and apart from this transcript.

By Mr. Walter W. Burton (Continuing):

Q. 138. Will you describe this, please, Carl, for the purposes of the record? Wait a minute. Approximately how long is this stick?

A. I would say it was two foot and a half; I don't know.

Q. 139. Approximately how much does it weigh, if you can tell?

A. Oh, I would say it weigh a half a pound, I guess.

Q. 140. Do you know what it's made out of?

A. I think the majority of those sticks are made out of hickory. I don't know too much about wood. I just [fol. 706] "heared" fellows talk about it.

Q. 141. Approximately how big around is it?

A. I don't know, but that is the stick, is all I can tell you.

Q. 142. They are just like this one?

A. Yes, sir.

Q. 143. All right. You say you were furnished with a key?

A. Yes, sir.

Q. 144. What is the purpose of the key?

A. The switches going across the main line are locked, and you don't throw them over unless your conductor give you orders to throw some over from one main line on another on farther than that. That's the purpose of the key. All brakemens are supposed to have a switch key.

Q. 145. What is the purpose of this brake stick, Carl?

A. We have different types of brakes on the cars, and some brakes requires a stick before you can apply it. Some brakes you put on with your hand.

Q. 146. You have to use this stick to apply the brake on some cars?

A. Yes, sir.

Q. 147. On the particular car that you were riding on that night that you were injured, at the time you were injured, was it necessary to use this brake stick to apply the brake on that car?

[fol. 707] A. No, sir.

Q. 148. What kind of brakes did the car have that you were riding on?

A. Ajax brake.

Q. 149. And how are those brakes applied?

A. You just apply those by hand.

Q. 150. I hand you here Plaintiff's Exhibit No. 2. Are the brakes applied by this wheel up here?

A. Yes, sir.

Q. 151. And it's not necessary, then, to use that stick to apply the brakes?

A. No, sir.

Q. 152. Is this Plaintiff's Exhibit No. 2 the same type of car you were riding on at the time you were injured?

A. Yes, sir.

Q. 153. Carl, taking Plaintiff's Exhibit No. 2, will you please point out to the jury just where you were standing immediately prior to the time you were injured?

A. I was standing on this platform here (indicating). That's where we stand to ride the cars. I was standing on this platform directly up under the brake. That's where we stand to ride the cars so that we can apply the brake when we need them.

Mr. Walter G. Burton: Let him speak into that mike. I can't hear him.

Q. 154. One more time, now, where were you standing, [fol. 708] please, sir?

A. I was standing on the brake platform. It was directly up under the brake where we apply our brake to control the car.

Q. 155. Where were your hands located?

A. My left hand was located on this top stirrup to the ladder.

The Court to the Witness: You had best speak into that microphone.

A. (Continuing) Where were we?

Q. 156. Where were your hands immediately before you were injured?

A. My left hand was right here (indicating) on this top stirrup and my right hand was on the brake.

Q. 157. On the brake?

A. Yes, sir.

Q. 158. How did you get onto this car immediately before the time you were injured?

A. When I got off the motor car—I can't show you—how did I get on this car?

Q. 159. Yes.

A. Climb up the ladder here (indicating) on this side, and when you get up there you cross over and on the brake.

Q. 160. You climb up those rungs there?

A. Yes, sir. There are some on the outside and some on [fol. 709] the inside, and you climb up and cross over to get on the brake step.

Q. 161. Immediately before the time you were injured, had your car been cut off or not?

A. I didn't understand you.

Q. 162. Immediately before the time you were injured, had your car been cut loose from that string you were talking about a minute ago?

A. You mean when I got on the car?

Q. 163. No. Just prior to the time that you were injured, had it been cut off?

A. Yes, sir.

Q. 164. Who cut it off, if you can remember?

A. The car cutter, Saunders; I don't know his first name.

Q. 165. Did you get on the car before or after it was cut loose from the west end of the string of cars?

A. I got on before because they can't cut the cars until you get on and tie up the brake, and wind the brake, which kick slack back because it's downgrade in order that the car cutter can pull the pin to uncouple it. Otherwise, when I first get on the car, the slack is already out and he can't uncouple it until I get on it.

Q. 166. You say you had the brake tied up. By that, do [fol. 710] you mean you had the brake on?

A. After I got on the brake step, the first thing you do, you tie up your brake in order to hold the slack.

Q. 167. Does that mean apply the brake?

A. Yes, sir.

Q. 168. Apply the brake. Now, what means of locomotion moved this car after it had been cut loose?

A. It rolled itself after you cut it loose; it's downhill.

Q. 169. It's downgrade?

A. Yes, sir.

Q. 170. What direction was it rolling in?

A. Westward.

Q. 171. When you got up on this car, did you have your brake stick and lantern with you?

A. Yes, sir.

Q. 172. Referring again to Plaintiff's Exhibit No. 2, where did you stick that brake stick?

A. I stuck it down between this top stirrup and the second one. You stick it behind one and in front of the other one and hook your light over top of it.

The Court to Mrs. Helen E. Dunfee, a Juror: Mrs. Dunfee, I see you hold a paper up to the light. Is that light bothering the jury again?

[fol. 711] Mrs. Helen E. Dunfee, a Juror: A little, but I can manage.

The Court to the Bailiff: Mr. Bailey, lower the shades a little.

Mrs. Helen E. Dunfee, a Juror: The glare comes from those buildings over there. I can manage it all right, thank you.

The Court: He can get it down so it will stop, I believe.

Mrs. Helen E. Dunfee, a Juror: Thank you.

The Court to the Bailiff: Do the same thing to the next one, please.

The bailiff complied with the foregoing request.

Mrs. Helen E. Dunfee, a Juror: That's so much better; thank you.

Mr. Walter W. Burton: Judge, Mr. Still says he is starting to be quite uncomfortable. Would it be all right to stop?

The Court to the Jury: Ladies and gentlemen, let's take a recess in this case. Don't discuss it in any way. I'll call you back in a little while.

Witness stands aside temporarily.

[fol. 712] Thereupon, it being 2:35 o'clock p.m., court recessed until 2:55 o'clock p.m., at which time the trial of this case was resumed.

CARL STILL, the plaintiff herein, on the stand at the hour of recess, being recalled, testified as follows:

Direct examination.

By Mr. Walter W. Burton (Continuing):

Mr. Walter W. Burton: Judge, I am going to have him demonstrate something before he sits back down, if it's all right, sir.

Q. 173. Now, Carl, you say you were standing on the brake step of a car similar to the one shown in Plaintiff's Exhibit No. 2 immediately before you were hurt?

A. Yes, sir.

Q. 174. Now, using the end of that table as the car, just exactly what position were you in? Demonstrate it to the jury, please, sir.

[fol. 713] A. When I was on the car?

Q. 175. Yes, when you were on that railroad car.

A. Well, for instance, the platform is where you are standing on, would be right where I am standing now, and the brake would be right here, and I was standing on the car like this (demonstrating), my left hand holding the top stirrup, and my right hand on the brake.

Q. 176. Do you have your feet pointed straight on that brake step or are they cater-cornered?

A. My feet are like they are now.

Q. 177. And that is cater-cornered to the end of that table?

A. Yes, sir.

Q. 178. You are not facing exactly straight against that table?

A. No, sir.

Q. 179. And why is it necessary to stand like that?

A. Well, the platform we are standing on is just about that wide (indicating), and that's all the room you have for your foot.

Q. 180. So there is not enough room for you to stand on there with your feet pointing exactly straight into the car?

A. Well, your feet would hang over the end of it.

Q. 181. Where were your hands, approximately? Now, again using this picture, as I understand you, you were [fol. 714] standing right on this platform?

A. Yes, sir.

Q. 182. Where were your hands? Point out to the jury on this picture.

A. My left hand was holding this grab iron right here (indicating), and my right hand was right here (indicating) on top of the brake.

Mr. Walter W. Burton to the Witness: All right, go on back.

The witness thereupon returned to the witness chair on the witness stand.

Q. 183. After you had gotten up on the car, Carl, do you recall whether or not any cars had been cut loose in front of the one you were riding on?

A. Yes, sir.

Q. 184. How many, if you recall?

A. There was a cut of cars ahead of me; maybe more, but I know there was one cut ahead of me.

Q. 185. What does "a cut of cars" mean?

A. That's the way they go, in cuts; sometimes two, five, ten, twenty; whatever that goes in that cut goes to the same track. The same track, they all cut together.

Q. 186. So if three or four cars there next to each other [fol. 715] are to go into the same track after leaving the lead track, they will all be together as they go down?

A. Yes, sir.

Q. 187. Be coupled up?

A. Yes, sir.

Q. 188. And that's called "a cut," whether it's one car, or two or more cars?

A. Yes, sir.

Q. 189. And you say you are sure that one cut went in front of you?

A. Yes, sir.

Q. 190. Do you know how many cars were in that cut?

A. No, sir.

Q. 191. What was the name of the brakesman, or brakesmen, up on those cars, if you can remember?

A. Well, the brakeman told me——

Q. 192. No, don't say what he told you. Do you remember seeing who he was?

A. Oh, no, sir.

Q. 193. Do you remember how many cars were in that cut?

A. No, sir.

Q. 194. What track was the car on that you were riding?

A. It was on the lead track when I was riding it.

[fol. 716] Q. 195. And, as I understand it, it was rolling west of its own volition?

A. Yes, sir.

Q. 196. What direction were you facing on this car?

A. I was facing westward.

Q. 197. And which end of the car were you on?

A. On the east end.

Q. 198. Did you have your back turned to the group of cars that you had been cut off from?

A. Not directly.

Q. 199. Cater-cornered?

A. Cater-cornered like.

Q. 200. As you just demonstrated to the jury?

A. Yes, sir.

Q. 201. All right. Was it necessary for you to be in that position?

A. Yes, sir.

Q. 202. Why was it?

A. Because I had to stand on the brake step to apply the brake when I needed it to take my car to the track I was going to.

Q. 203. Was that the usual, ordinary, and customary practice there of the yard brakesmen to stand on that step in that manner?

A. Yes, sir.

[fol. 717] Q. 204. Was it your duty or was it the custom and practice in the switching operation such as you were engaged in immediately before you were injured, to watch the movement of the train and the cars attached to the engine once you had been cut loose?

A. No, sir, it wasn't my duty. We make it a practice of looking around and make sure, you know, you are—things are going along all right.

Q. 205. All right. Did you look around and see?

A. Yes, sir.

Q. 206. And then what did you do?

A. When I looked around, the board was red; so I don't

have to look back no more now. I just watch where I am going in order to give the fellow on the cars ahead of me time to get into the track he is going to, for them to throw the lead switch back for me to go to my track. If we don't do that, we all go to the same track.

Q. 207. So you have to hold back on your car to see that the cut in front of you gets to the particular track it is supposed to go to, is that correct?

A. Yes, sir, for this reason: If I don't give him time to get all the way into his track, you can corner the car, if I go down it straight, corner the car he is on, and cause a wreck.

Q. 208. And by "corner," you mean strike the corner of the car in front of you?

[fol. 718] A. Yes, sir.

Q. 209. Whose duty was it to watch the back end of the train once you had been cut off?

A. After I am cut off, it's the conductor's duty to get it stopped so they won't get coupled back up, or anything, so we can go to our track.

Q. 210. Is there any way you can control the movement of those cars behind you once you have been cut off?

A. No, sir.

Q. 211. Is there any way you can make your car go faster to get out of the way?

A. No, sir; they just drift.

Q. 212. They just drift?

A. Yes, sir, downhill.

Q. 213. However, you can stop it?

A. I can stop it, but I can't make it go faster.

Q. 214. What was the position of the car immediately prior to the time it was cut off of the west end of that string of cars?

A. I don't understand you.

Q. 215. Where was it in relation to, say, where the conductor stands?

A. Well, we get up the track—we will have to be cut off—we are usually cut off before we get to the conductor so he can tell us which track we are going to without stopping the movement of the rest of the train.

[fol. 719] Q. 216. All right; now, looking at Plaintiff's Exhibit No. 1, which you have already stated shows where

the conductor was standing, that is, where these two men are presently standing, where was the west end of that string of cars at the time you were cut off?

A. The west end was along—right along in here (indicating). See the joints of the rail there?

Q. 217. Right.

A. The car—length of a car is similar to the length of one of these rails.

Q. 218. All right; then, you pointed to a spot approximately a car-length east of where the conductor was standing?

A. Yes, sir.

Q. 219. Now, who told you to get on that particular car, Carl?

A. The—when we come out to the yard, the car cutter, he have a list how these cars are going. So, we get off the motor car; we say, "How are they going?" And he tell us how many go each time.

Q. 220. And who told you that time?

A. Car cutter Saunders.

Q. 221. George A. Saunders?

A. Yes, sir.

Q. 222. Now, who told you which track that car was to go into?

[fol. 720] A. Our conductor.

Q. 223. And who was that?

A. Thomas A. Taylor, Jr.

Q. 224. At what time did he tell you which track that car was going into?

A. At what time?

Q. 225. Yes. When did he tell you?

A. As we passed by him. After we are cut off we drift on down by the conductor, and he holler out which track he want it taken to.

Q. 226. So, as I understand you, you had been cut off and rolled down to where the conductor was standing?

A. Yes, sir.

Q. 227. And what did he say?

A. "Head ten."

Q. 228. "Head ten"?

A. Yes, sir.

Q. 229. And what did that indicate to you?

A. When he holler, "Head ten," if I hear him and understand what he want me to do, I say, "Head ten." That means I understand.

Q. 230. And what was track ten used for that particular night?

A. We were putting shop cars in it.

Q. 231. You were putting shop cars in it?

A. Yes, sir.

[fol. 721] Q. 232. There has been evidence here, Carl, that a shop car is one that is being placed in a track to be taken to the shop for repairs for some reason or other; is that correct?

A. Yes, sir.

Q. 233. Now, prior to the time the conductor told you that this was to go in the lead ten, did you know that was a shop car?

A. No, sir. When I got down to the conductor, he said, "Shop car, head ten."

Q. 234. And that's the first time you knew it was the shop car?

A. Yes, sir. Before that I know I had one car, but I didn't know anything about it.

Q. 235. You just knew you were riding in a cut of only one car?

A. Yes, sir.

Q. 236. Now, Carl, if you can, in your own words describe in detail what happened at the time you were injured.

A. From the beginning?

Q. 237. From the beginning.

A. Well, beginning after I found out from the car cutter how the cars were going, that is, how many for each cut, and he told me, he explained how the cars were being cut up, well, I goes on up above the conductor there and gets [fol. 722] up on the car; and the first thing you do when you get on the car, you wind your brake up because you can't cut the car until you can get slack for him to cut it. So after you wind your brake up and keep the slack back, the car cutter say, "Way down," and that means knock the brake off and roll down. So I did that, and I rolled, I will say, a car-length until I was to the conductor where he stand beside the switch tower and operate the board: and

he says, "Shop car, head ten." So I repeated what he said, "Head ten."

And in the meantime my light and stick is hooked in this grab iron here I described to you a few minutes ago. I take my light off the stick, and you wave your light over this way (indicating) and back like that (indicating); that means you are going to track ten. When I give that signal, the switchman give the signal back, and I know he know where I am going.

So I rolled on down the track there about—no. After he told me I was going to track ten—wait a minute.

Q. 238. How far did you roll after he told you track ten, if you can recall?

A. Well, after he told me to go to track ten, I noticed behind me and in front. You have got to watch both ways when you first break off since sometimes the trains will break, off goes the knuckle, and I noticed that, and looked back to see if everything was going like it is supposed to be, [fol. 723] and he throwed the board red, and then I watched the car in front of me.

I didn't throw the latch over to hold the brake. You can apply it by hand and hold it with your hand and let the car ease on down the track. So I was sort of holding back on the car to give whoever was on the cut of cars ahead of me time to get to his track in order for them to throw the lead switch back over for me to go to my track; and I got about two car-lengths below the conductor when I was struck.

Q. 239. So, in your opinion, from the time you were cut off from the west end of that string of cars, you traveled approximately three car-lengths before you were struck?

A. Three or three and a half.

Q. 240. Approximately how long is a railroad coal hopper of the kind you were riding on that night?

A. A railroad car is about forty foot long.

Q. 241. About forty feet?

A. I don't know exact, but I think it's about forty foot long.

Q. 242. So, then, you traveled somewhere between a hundred and twenty and a hundred and fifty feet, roughly speaking?

A. Yes, sir.

Q. 243. After you saw this board was red when you say you looked back, Carl, what did that indicate to you?

[fol. 724] A. It indicated that the train was going to stop, and I watch where I am going to get to my track.

Q. 244. So, it wasn't necessary for you to keep looking back?

A. No, sir. If I keep looking back, I can't watch where I'm going.

Q. 245. Now, you say the car and the string of cars came in contact, Carl. Just describe that in your own words for us, please, what happened.

A. Well, I was standing on the car the way I told you I was standing there, and all of a sudden—"bam"!

Q. 246. What kind of a lick was it?

A. Well, it hit so hard I almost went over in the car.

Q. 247. What part of you, if any, came in contact with that car?

A. From right along here about my waist down to about eight inches above my knee.

Q. 248. Now, you are pointing to your left side approximately at your waist, and then to your left knee, is that correct?

A. Yes, sir, that's the side.

Q. 249. Were you thrown against the car?

A. Yes, sir.

Q. 250. How hard were you thrown against it?

A. Too hard.

[fol. 725] Q. 251. Well, what do you mean by "too hard"? What effect did it have on you?

A. It throwed me against the side of this——

At this point, the witness looked for an exhibit.

Q. 252. Using Plaintiff's Exhibit No. 2, now, how did you hit the car, Carl?

A. I hit the side of this rim—and see this little knot right here (indicating)? That's the air line. That hit against my leg and up through my hip here. See, I am this tall from this platform to the top of the car. It hit me across my waist, and I hit against this rim here (indicating).

Q. 253. You are pointing to what appears to be a rim on top of a coal hopper shown in Exhibit 2, is that right?

A. Yes, sir.

Q. 254. What kind of rim is that?

A. Steel rim.

Q. 255. Now, Carl, where had you put your lantern when you got up there?

A. I put it between the first and second grab iron, the top of the ladder.

Q. 256. And you had the light hanging over?

A. Yes, sir.

[fol. 726] Q. 257. Now, did it knock you unconscious when you hit the side of that car?

A. I hit so hard, I don't know; I don't remember.

Q. 258. Do you remember how you got down off of that car?

A. Well—can I tell it in my own words?

Q. 259. Yes, sir, tell it in your own words.

A. Up until I come and talked to Mr. Burton concerning my case, I was under the impression I was knocked off the car, from the fellows talking down there.

Mr. Sanders, Sr.: We object to that, Your Honor.

Q. 260. Do you remember——

The Court: Wait just a minute. Objection sustained.

Mr. Walter G. Burton: We agree to that.

The Court to the Jury: I instruct you not to consider it.

By Mr. Walter W. Burton (Continuing):

Q. 261. Do you remember yourself how you got down, Carl?

A. No, sir. I thought Manns helped me. They was talking——

Q. 262. Not what you thought. Do you personally know how you got off the car?

[fol. 727] A. No more than what they told me.

Mr. Sanders, Sr.: We move to strike this out.

The Court: Yes, I sustain the motion and instruct the jury not to consider what he thought or surmised about it.

By Mr. Walter W. Burton (Continuing):

Q. 263. Now, Carl, not what somebody told you or what you heard or what you think; do you know personally how you got down?

A. No, sir.

Q. 264. What's the first thing you remember after you got down?

A. I remember laying in the motor car a little; I don't know too much about it; but I remember I was hurting pretty bad.

Q. 265. Where were you hurting?

A. Through my left hip and side and back——side, stomach. It was just hurting all through here.

Q. 266. Had you ever suffered pain in this particular area before like you were suffering that night?

A. Not in my life.

Q. 267. What kind of pain was that, Carl?

A. Can I tell you my way?

Q. 268. Yes, sir, that's what I want you to do.

[fol. 728] A. It's like you bump your elbow like that, and a pain will shoot through. Instead of my elbow, it was through my leg and my back. That's the only way I know to tell it.

Q. 269. Had you ever suffered pain like this before?

A. No, sir.

Q. 270. Approximately how long, if you can remember, did you stay on the motor car, Carl?

A. I don't know.

Q. 271. Where did you go after you left the motor car?

A. Well, I was addled-like. I remember being in the office talking to the yardmaster.

Q. 272. And who was that yardmaster?

A. Mr. Webb.

Q. 273. And what was your condition as to pain and suffering at that time?

A. Well, I was hurting pretty bad; practically numb-like.

Q. 274. Approximately what time was it that you were injured, if you can remember?

A. The best I remember, it was around twelve-thirty or twelve-thirty-five, something like that.

Q. 275. Had you worked the night before that?

A. Yes, sir.

Q. 276. Had you had any difficulty in performing your duties there as a brakesman that night?

[fol. 729] A. I have never had difficulty performing my duty.

Q. 277. Did you work prior to that the night you were injured?

A. You mean before?

Q. 278. Yes.

A. Yes, sir.

Q. 279. Did you have any trouble performing your duties that night?

A. No nights.

Q. 280. Where did you go after you talked to Mr. Webb?

A. Down to the shanty where we eat.

Q. 281. Down to the shanty where you eat?

A. Yes, sir.

Q. 282. Is that the same building shown in Plaintiff's Exhibit No. 4?

A. Yes, sir.

Q. 283. What did you do when you got in the shanty?

A. Just laid there across the bench.

Q. 284. Where were you laying down in the shanty, Carl?

A. The night I was injured?

Q. 285. Yes.

A. There's a bench across there where you can sit on [fol. 730] when we eat, and I laid on the bench some; I laid on the table some that night.

Q. 286. What was your condition as to pain and suffering that night while you were lying there?

A. I never hurt that bad before in my life.

Q. 287. Why didn't you go home?

A. Well, Mr. Webb told me he called Mr. Beavers and——

Q. 288. Just a minute. Who is Mr. Beavers?

A. He's the yardmaster. Mr. Webb is the yardmaster, but Mr. Beavers is a little larger yardmaster. And he said Mr. Beavers asked him how bad was I hurt, and he told him he didn't know, but only know I got hurt, and Mr. Webb told me, at least, that Mr. Beavers said he would be right on over and see about it.

Q. 289. Did Mr. Beavers come down there?

A. Yes, sir, he came down about a quarter of seven.

Q. 290. And what did he tell you when he got there?

A. Why, he asked me how did I feel, and so forth like that, and then he told me that Mr. Webb filled out an acci-

dent happened, and Mr. Lilly would probably want to see me.

Q. 291. And what did you tell Mr. Beavers, if anything?

A. And I told him all right, but if he didn't want to fill out the accident report, it was all right, because I didn't ask him to fill it out. Mr. Webb insisted on filling it out.

[fol. 731] Q. 292. Why didn't you mark off and go home, Carl?

A. Mr. Beavers told Mr. Webb, the way I understand it, for me to wait there until he come over there; he was a little tied up right then.

Q. 293. Can you tell us in a general way what Mr. Webb's duties are there as yardmaster?

A. Our conductor gets his instructions from the yardmaster. Mr. Webb was the yardmaster for the West Yard only, and Mr. Beavers was the yardmaster for the whole East and West Yard.

Q. 294. Mr. Beavers is over Mr. Webb?

A. Yes, sir.

Q. 295. And Mr. Webb is over the conductor?

A. Yes, sir.

Q. 296. And the conductor is over you?

A. Yes, sir.

Q. 297. What time did you leave that morning? Did you leave early or did you leave when the shift was over?

A. I left when the shift was over.

Q. 298. And how did you leave, if you can recall?

A. I left and—Jones—I don't know his first name—the boy that was up here today, he helped me up on the car, helped me across the car—the train was setting on the [fol. 732] main line—and Arthur Brown and Buster Dye helped me on down to the car and taken me home.

Q. 299. And who drove home?

A. Buster Dye.

Q. 300. Whose car was it, Carl?

A. Buster Dye's. Sometime he would ride with me and sometime I would ride with him.

Q. 301. And did he drive that morning?

A. Yes, sir.

Q. 302. What was your condition as to pain when you left there that morning, Carl?

A. I was hurting too bad. I was just tore all to pieces.

Q. 303. And what did you do after you got home?

A. Well, when I got home, after I was there about ten or fifteen minutes, something like that, I got a call from the yard office to come down there.

Q. 304. Who called you from the yard office?

A. I couldn't say, but it sounded like Donald Weiser.

Q. 305. You thought it was Mr. Weiser?

A. Yes, sir, it sounded like his voice. I have talked to him before on the phone.

Q. 306. And what does he do for the Norfolk and Western?

[fol. 733] A. He is the day-shift yardmaster.

Q. 307. He is the day-shift yardmaster?

A. Yes, sir.

Q. 308. What did Mr. Weiser tell you?

A. He told me Mr. Lilly wanted me to come to his office as soon as I could get down there.

Q. 309. And what did you tell Mr. Weiser?

A. I told him I would be down there as soon as I could get someone to help me.

Q. 310. What did you do then?

A. I tried to get in touch with a couple of fellows and couldn't get hold of them, and he called me back.

Q. 311. Who called you back?

A. Mr. Weiser.

Q. 312. What did he say?

A. He told me Mr. Lilly was still waiting for me to come down.

Q. 313. What did you say?

A. I told him if he wasn't doing anything, looked like he could come and help me; that I would come down there as soon as I could get somebody to help me.

Q. 314. Then what did you do?

A. He told me to come on in as quick as I could, and I [fol. 734] told him I would. And I called Donald Allen down at St. Luke's Hospital.

Q. 315. In response to your call, did Donald Allen come there to your home?

A. Yes, sir.

Q. 316. What did he do?

A. He came in and asked me what was wrong, and I told him I got hurt a little bit.

Q. 317. Don't say, now, what you told him. Don't say what you said to anybody except the Railroad officials. Now, what did Donald do after he came to your house?

A. He came in and helped me out to the car and taken me down to the scale office.

Q. 318. And where is the scale office located?

A. It's in the East Yard.

Q. 319. And why were you going to the scale office?

A. Because Mr. Lilly called for me to go down there.

Q. 320. Is that where his office is?

A. Yes, sir.

Q. 321. What happened after you got down there?

A. When I got down there, I walked in the door. He looked at me and he said, "Still, did you see those cars coming before they struck you?" I said, "Mr. Lilly, you don't think I would stand up there and get hit if I seen them [fol. 735] coming." And he said, "I reckon not."

Q. 322. What else did he say to you, if anything?

A. And he said, "I have some papers here I want you to sign." I said, "Yes, sir."

Q. 323. Did you sign those papers?

A. Yes, sir.

Q. 324. Did he tell you what they were?

A. I read them.

Q. 325. And what—had they already been written before you got there?

A. Yes, sir. Jack Allen—that's his secretary—he was just finishing them up when I went in the door.

Q. 326. So they had already been written before you got there. Did he ever ask you anything about them before he had written those papers?

A. Well, I read the papers and——

Q. 327. I say, before he wrote them, did he ask you anything about them?

A. He asked me about the accident report.

Q. 328. Before the papers were written, did he ask you anything about——

A. Them papers was written when I got there.

[fol. 736] Q. 329. So, had he asked you before you got there anything about what was in the papers?

A. I didn't talk to him until I got down there.

Q. 330. All right. So the papers were already written when you got there?

A. Yes, sir.

Q. 331. All right. What did he say?

A. He told me that he had the accident report of where Mr. Webb had sent over where I got hurt, and he wanted me to sign those papers. And he asked me did I think I would have to go to the doctor, or anything, and I told him I did not know. I said, "Mr. Lilly, I am hurting pretty bad." He said, "Don't go until you let me know whether you are going or not." And I said, "Yes, sir, but I am almost sure I am going now."

So I read this report over. There was six copies. And I said, "Mr. Lilly, this is not exactly like it happened." And he said, "That's all right; you go on and sign it and take care of it, and I'll take care of you." You have to sign those papers if Mr. Lilly tell you to sign them.

Q. 332. Did he give you a copy of those papers?

A. No, sir.

Q. 333. What did he tell you?

A. I told him I think I was sure I was going to a doctor. [fol. 737] He told me to go by the division office and see the doctor.

Q. 334. Did you leave then?

A. Yes, sir.

Q. 335. Where did you go?

A. I went out there and got in this same boy's car.

Q. 336. What boy is that?

A. Donald Allen. He helped me back over to the car and taken me back up to the division office, and I told him I did not think I would be holding him up too long, I had to go in there for something. And I went in and see Dr. Troup—I think that's his name—our Company doctor—and told him about how I got hurt and how I feel, and so forth like that, and I told him the pain I was having; so he told me that I would have to go to the Sanitarium.

Q. 337. What did you tell Dr. Troup?

A. I told him that Mr. Lilly told me to get in touch with him before I went to a hospital, and I would like to call him and let him know.

Q. 338. What did Dr. Troup tell you?

A. Dr. Troup told me I didn't have to call Mr. Lilly and

ask him anything because he was the doctor and he suggested I go to the Sanitarium.

Q. 339. What did you do then?

A. Well, I told Mr. Troup it was a good job and I would [fol. 738] appreciate it if he would let me call Mr. Lilly and let me see what he said about it; and Mr. Troup called Mr. Lilly himself and handed me the phone.

Q. 340. Did you talk to Mr. Lilly over the phone?

A. Yes, sir.

Q. 341. Did you recognize his voice?

A. Yes, sir.

Q. 342. What did you say to him and what did he say to you?

A. He told me it was all right to go on up to the Sanitarium, but to report back to him as soon as I got away from up there and not mark off.

Q. 343. Where is Dr. Troup's office located in the divisional office, if you recall?

A. It's on the first floor off Princeton Avenue. Go in a door, turn right, and down at the end of the hall on the left.

Q. 344. What did you do after you left Dr. Troup's office?

A. Well, after I talked to Mr. Lilly and he said it was all right that I go to the Sanitarium, I went up there.

Q. 345. Who took you up there?

A. Donald Allen.

Q. 346. Where did you go after you got to the Sanitarium Clinic?

A. I went up to—there's a girl there as you first go [fol. 739] in the door, and she asks you where you work and, you know, things like that. And I told Don I would call him back if I needed him. And I told her where I had been hurt, and she asked me where I worked, and so forth like that, and I told her, and they sent me up to see Dr. St. Clair.

Q. 347. Dr. St. Clair?

A. Yes, sir.

Q. 348. What, if anything, did Dr. St. Clair advise you?

A. Well, he examined me and X-rayed me.

Q. 349. And what did he tell you?

A. And he told me that I was bruised up pretty bad, but he didn't think anything was broke; that I would have to

get in water as hot as I could stand it six or seven times a day. And I asked him would I have to mark off—I explained to him Mr. Lilly told me not to mark off—and he said, "You don't have to mark off; if you don't do any work, it will be all right."

Q. 350. What did you do then?

A. I called Donald Allen and told him to come back up and get me, and he came and taken me home. And I started getting in this hot water.

Q. 351. As I understand, Donald came and got you and took you home?

A. Yes, sir.

[fol. 740] Q. 352. During this entire period you went from your home to Mr. B. G. Lilly's office, and then you went to Dr. Troup's office, and then you went to the Sanitarium Clinic, what was your condition as to pain and suffering, Carl?

A. I was practically numb-like and aching.

Q. 353. How did you get around?

A. Donald Allen was helping me. And when I got to the Clinic, the boy at the Clinic would help me along, and different people you come in contact with going to a hospital.

Q. 354. Now, did you go back to work the night of January 23rd?

A. Back to the job?

Q. 355. Yes.

A. Yes, sir.

Q. 356. Did you do any work that night?

A. No, sir.

Q. 357. Carl, I hand you here what purports to be a 1958 calendar. Now, when you get into these dates, if you want to, you go ahead and refer to that calendar.

A. Yes, sir.

Mr. Walter W. Burton: Judge, we would like to introduce this in evidence. I don't know how I would ever prove it is a '58 calendar. Mr. Sanders seems to be agreeable. There is no date.

[fol. 741] Mr. Sanders, Sr.: We will agree to it.

Mr. Walter W. Burton to the Reporter:

Just mark that for identification, please, mam.

The 1958 calendar was thereupon offered in evidence by the plaintiff, and the same was introduced, filed, marked:

"Plaintiff's Exhibit No. 20. 10-7-59 N. V. H."

and is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Walter W. Burton (Continuing):

Q. 358. Now, Carl, looking at that calendar that has just been marked as "Plaintiff's Exhibit No. 20," what day was January 23rd?

A. January 23rd?

Q. 359. Yes.

A. It was on Thursday.

Q. 360. That was on a Thursday?

A. Yes, sir.

Q. 361. Now, did you report back to work on the night of January 23rd, which would have been Thursday?

A. Yes, sir.

Q. 362. How long did you stay there after you reported?

[fol. 742] A. About ten minutes.

Q. 363. Why did you report back to work that night?

A. Well, I couldn't mark off. Mr. Lilly say he would look out for me, and I was hurting.

Q. 364. Why did you only stay ten minutes?

A. I wasn't able to go in and stay any, but he told me to go.

Q. 365. Why weren't you able to stay there once you got there?

A. I was getting in water as hot as I could stand it five or six times a day—seven or eight later—and it was about ten below zero out there, and it was doing me more harm than it was doing me good.

Q. 366. Do you recall how you got to work on the night of January 23rd?

A. Yes, sir.

Q. 367. Who took you?

A. Buster Dye.

Q. 368. Who else rode with you, if you can recall?

A. Arthur Brown.

Q. 369. How did you get home that night?

A. Donald Allen; I told him that I might get to come back home, I didn't know, and I wanted him to follow us down, and if I wasn't back within thirty or forty minutes [fol. 743] he could go back home, and he said, "O.k." So he did follow me down. And if I could get permission from my conductor to go in, you know, he would be waiting for me.

Q. 370. So, do I understand you that Donald Allen took you home?

A. Yes, sir.

Q. 371. What was your condition as to pain and suffering during the time you were there and while you were going home?

A. Just hurt. It's a terrible feeling.

Q. 372. Did you report back to work, referring to your calendar there, the nights of January 25th—no; 24th and 25th?

A. No, they was our off-nights.

Q. 373. And what days were those?

A. Friday and Saturday.

Q. 374. You were off on Friday and Saturday?

A. Yes, sir. You see, I was regular on the West Yard. We have two off-days.

Q. 375. And at that time were Friday and Saturday your off-days?

A. Yes, sir.

Q. 376. What was your condition as to pain and suffering during the twenty-fourth and twenty-fifth?

[fol. 744] A. Well, my hurting was the same, and I was getting in the water like the doctor would tell me. And this Allen boy that works at the hospital, I have had him to come up and rub me with this heat liniment, and he got a heat pad and brought it up there.

Q. 377. During this time, did you attempt to mark off at the Railroad?

A. Yes, sir.

Q. 378. Who did you call at the Railroad?

A. I would call whoever was on duty.

Q. 379. Well, do you ever recall calling Mr. Davis, who testified here previously?

A. Yes, sir.

Q. 380. And——

A. I remember him in particular because he let me talk to Mr. Lilly.

Q. 381. And what did he tell you when you tried to mark off?

A. He told me he would like to, but he couldn't mark me off, he would let me talk to Mr. Lilly.

Q. 382. And what did Mr. Lilly tell you when you talked to him?

A. He told me, "Still, I talked to you and I told you I would take care of you, and all you have to do is go down there and just lay around. I am going to pay you for an eight-hour shift and I am expecting you to go down there." [fol. 745] Q. 383. Did you report back to work on the night of January 26th?

A. Yes, sir.

Q. 384. What night was that?

A. Sunday.

Q. 385. Who did you report to?

A. I reported to my crew. I was regular on the West Yard.

Q. 386. What time did you report, if you recall?

A. Eleven-fifteen.

Q. 387. How long did you stay there that night, the twenty-sixth?

A. It's been so long. Let me see. I stayed there that night about fifteen minutes.

Q. 388. Why didn't you stay there longer?

A. I don't know exactly; I say about fifteen minutes.

Q. 389. Why didn't you stay there longer, Carl?

A. My hurting hadn't stopped any.

Q. 390. Were you still taking these treatments?

A. Yes, sir.

Q. 391. Why didn't you mark off?

A. Mr. Lilly was going to take care of me. I didn't know how bad I was hurt, and you have got to do like Mr. Lilly [fol. 746] tell you if you work on Bluefield Yard.

Q. 392. Did you go back home that night, the twenty-sixth, you say, in about fifteen minutes?

A. Yes, sir.

Q 393. On the twenty-seventh what did you do, if any thing Carl? Did you go see any other doctors?

A. Yes, sir, but I don't know the exact dates. I went back to see another doctor on the twenty-fifth.

Q. 394. Who did you see on the twenty-fifth, if you recall?

A. I have been to so many doctors; let me think. (Pauses) I am not positive, but I think I saw Dr.—now, one of these dates Dr. Snider—Dr. Snider—Dr. St. Clair had gone to dinner. I had waited up there an hour or so, and was kind of late getting there, and he had gone to dinner, and I asked the nurse, I say, "I set here and wait to see him——

Q. 395. Don't say what you said.

A. I asked the nurse about seeing the doctor and he had gone to dinner, and she sent me to see another doctor.

Q. 396. Was it Dr. Hosmer?

A. Yes, sir, it was Dr. Hosmer.

Q. 397. Who was Dr. Hosmer, Carl?

A. A doctor at the Bluefield Sanitarium Clinic.

Q. 398. And did he examine you?

[fol. 747] A. Yes, sir.

Q. 399. What did he tell you, if anything?

A. I got my dates mixed up. But he sent me to Dr. Gage; I don't know if it was this day or not, it's been so long. If I had known all this would happen, I would have kept a copy or record of everything that happened. I don't remember.

Q. 400. Carl, just to the best of your ability; I realize it is hard to remember these specific dates, but approximately when was it? Was it several days after you had seen Dr. St. Clair?

A. That I saw Dr. Gage?

Q. 401. No, that you saw Dr. Hosmer.

A. Several—you mean seven?

Q. 402. Several; two or three.

A. Yes, sir.

Q. 403. Did Dr. Hosmer examine you?

A. Yes, sir.

Q. 404. What did he tell you, if anything?

A. He said I would have—he taken me to see a nerve doctor. I think he said, "nerve."

Q. 405. And who did he take you to see?

A. Dr. Gage.

Q. 406. And where is Dr. Gage?

A. On another floor in the same building.

[fol. 748] Q. 407. In the Bluefield Sanitarium Clinic?

A. Yes, sir.

Q. 408. How many times did you see Dr. St. Clair, if you can recall, Carl?

A. Two, I think.

Q. 409. Two?

A. I am not sure. I think it was two.

Q. 410. Now, on the night of the twenty-sixth did you report back to work?

A. Yes, sir.

Q. 411. And how long did you stay?

A. Maybe fifteen minutes.

Q. 412. All right. Now, on the night of the twenty-seventh did you report back to work?

A. Yes, sir.

Q. 413. And how long did you stay that night?

A. I stayed, to the best of my knowledge, the whole night because that night Mr. Beavers came down and talked to me and asked me who gave me permission to go home the night before. So I told him how I was hurting and I just had to go home, I couldn't stand it down there. He said, "Well, Still, Mr. Lilly is paying you for the whole eight hours, and I talked with him and it was my understanding he intended for you to stay here the whole eight hours." [fol. 749] And I said, "Mr. Beavers, you tell Mr. Lilly I will stay as long as I can, but the way I am hurting, I may have to go home."

Q. 414. Did you do any work that night?

A. No, sir.

Q. 415. Where did you stay?

A. In the white shanty. They have a cushion out of a cab in the white shanty, and I was laying across it.

Q. 416. You mean there are two separate shanties down there—one for white brakemen and one for colored folk?

A. Yes, sir.

Q. 417. And why were you in the white shanty?

A. They had a better fire, a better shanty. It was warmer in there. Getting in this hot water and stuff, I just couldn't stand it.

Q. 418. All right. On the twenty-seventh when you got

off, or on the twenty-eighth when you got off, what was your condition as to pain and suffering?

A. It was practically the same. I went back to the hospital again.

Q. 419. And who did you see that time, if you can recall?

A. Dr. Hosmer and Dr. Gage.

Q. 420. And what did they tell you, if anything?

A. I told them that this hot water I was getting in wasn't [fol. 730] helping me, and I couldn't stand the pain, and what could they do about it. So he told me I would have to go to the Bluefield Sanitarium to take physical therapy treatments once a day.

Q. 421. And what was the physiotherapy treatment, Carl?

A. Well, they put you on a table and put a pad a little wider than this (indicating) in the middle of my back, and they had wires running to it, and put another one around my left ankle, and they had a machine—it looked like a machine where you charge a battery on a car—and they would turn that machine on and juice would run into there and heat would come down into this pad.

Q. 422. Sort of like a hot pad?

A. Yes, sir, all but the juice.

Q. 423. Who prescribed this treatment? Who told you to do that, Carl?

A. Between Dr. Gage and Dr. Hosmer.

Q. 424. One or the other?

A. Yes, sir.

Q. 425. How many of those treatments did you take, if you can recall, Carl?

A. I taken those treatments up until I was—the day before I was committed to the hospital.

Q. 426. All right; let's don't get too far ahead. On the night of the twenty-eighth did you report back to work?

[fol. 731] A. Yes, sir.

Q. 427. Where did you report that night?

A. The West Yard.

Q. 428. What was your condition as to pain and suffering?

A. The same; I was hurting.

Q. 429. Why did you report back to work?

A. Practically every day—I'll say every day I would try

to mark off and they wouldn't mark me off. I liked that job, so I go back. I don't want to be fired. I have been fired for no reason at all, so——

Mr. Sanders, Sr.: We move to strike that out, Your Honor, and instruct the jury not to consider it.

The Court: I didn't hear that last——

The Court to the Reporter: Would you read it, please?

The Reporter: (Reading from the record) "Practically every day—I'll say every day I would try to mark off and they wouldn't mark me off. I liked that job, so I go back. I don't want to be fired. I have been fired for no reason at all, so——"

The Court to the Jury: Yes, I instruct you not to consider that last part about liking the job and didn't want to be fired. It is a conclusion on the part of this witness [fol. 752] and a self-serving statement.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 430. Had you attempted to mark off, Carl?

A. Yes, sir.

Q. 431. And why didn't you?

A. They wouldn't mark me off.

Q. 432. What would be the effect of you failing to report for work if you hadn't marked off?

A. If I don't report to work and haven't marked off, you don't have a job. That's desertion.

Q. 433. You mean they fire you?

A. Yes, sir.

Q. 434. Did you work any on that night—the twenty-eighth, I believe we are talking about?

A. No, sir.

Q. 435. What did you do, if anything?

A. Just laid there in the shanty.

Q. 436. And which shanty were you in that night?

A. The white shanty.

Q. 437. Did you at any time during this period, Carl, [fol. 753] attempt to fill out an accident report?

A. I went to Mr. Lawson—at the time he was the treasurer of our Lodge 533 there at Bluefield—

Q. 438. Now, Carl, don't say what he told you or what you said, but did you attempt to fill out that accident report?

A. Yes, sir.

Q. 439. Did you do that?

A. Yes, sir.

Q. 440. And where did you send it, if you know?

A. Somewhere in Cleveland; I don't know where.

Q. 441. You don't know where it went?

A. To the best of my knowledge, it went to Cleveland.

Q. 442. But Mr. Lawson helped you fill that out?

A. Yes, sir.

Q. 443. Did you report back to work on the twenty-ninth?

A. Yes, sir.

Q. 444. How long did you stay that night, if you can recall?

A. I don't remember.

Q. 445. Did you do any work that night?

A. No, sir.

Q. 446. At any time from the time that you were injured on the twenty-third, did you ever actually do any work?

A. No, sir.

[fol. 754] Q. 447. Why didn't you?

A. I wasn't able.

Q. 448. Why weren't you able?

A. I was hurting.

Q. 449. Where were you hurting?

A. My back and my leg, up through my thigh, and I had pain going all the way down to my ankle.

Q. 450. Now, Carl, as I understand you, you say you had been going to the Clinic to take physiotherapy treatments during this period, is that correct?

A. Yes, sir.

Q. 451. Did you go to see any other doctor on or about the twenty-ninth or the thirtieth?

A. I went to St. Luke's—after I talked to Mr. Lawson, after me hurting and I told him I wasn't getting any better from the treatment they was giving me and asked him what he think about me going to another doctor, and he told me he didn't——

Q. 452. Don't say what he told you.

A. Well, I went to St. Luke's on the thirtieth, then.

Q. 453. And what doctor did you see at the St. Luke's on the thirtieth?

A. Dr. Snider.

Q. 454. Where did he send you, if anywhere? What did [fol. 755] he tell you?

A. He X-rayed me and examined me, and I told him about the treatments that I was taking and explained to him about I am going—had been trying to mark off and they didn't mark me off, and he told me I should mark off. So I told him that I had two off-days coming right after that, and if I didn't get any better over those two off-days I was just going to mark off whether I lose my job or not. So he advised me to do that and told me if anyone connected with the Railroad wanted to talk to him about it, told me to tell them to call him.

Q. 455. Carl, did you report to work, then, on the night of the thirtieth?

A. Yes, sir.

Q. 456. What was your condition as to pain and suffering that night?

A. As the feeling would come back in me—I was sort of numb-like there when I first got hurt, and as the feeling would come back I would just throb—aching.

Q. 457. How long did you stay the night of the thirtieth, if you recall?

A. All night, I think.

Q. 458. Did you do any work that night?

A. No, sir.

Q. 459. Why didn't you do any work that night?

A. I wasn't able.

[fol. 756] Q. 460. Did you report to work the nights of January 31st and February 1st?

A. No, sir.

Q. 461. Why didn't you?

A. That was our off-day again, Friday and Saturday.

Q. 462. And what night did you again report back to work, if you did?

A. Sunday, the second of February.

Q. 463. Was that the last night that you reported for work, if you can recall?

A. No, sir, it wasn't.

Q. 464. It wasn't.

A. No, sir. I marked off on the second, but it was that night. Wait a minute. I believe that was the night I marked off. I am not sure.

Q. 465. The second?

A. But I wasn't on my job when I marked off—I mean when—on the second, not on the West Yard where I worked.

Q. 466. Some witnesses testified you wrote up some numbers and papers there one night. Do you recall that?

A. Yes, sir.

Q. 467. Did you do that?

A. Yes, sir, I was forced to do that.

Q. 468. Well, during any of this period did you do any physical labor whatsoever?

[fol. 757] A. I taken a derail off.

Q. 469. And what is a derail?

A. To line up for a train to go down through the station.

Q. 470. Where was that derail located?

A. Down near the station.

Q. 471. And what point did you leave from to walk up and take that derail off?

A. From the shanty at Mercer Street bridge.

Q. 472. Approximately how far would it be from that shanty up to the place where that derail was located?

A. I don't know.

Q. 473. Well, would it be a hundred feet? Approximately how long would it take you to walk that far ordinarily?

A. Well, maybe five minutes.

Q. 474. How long did it take you to get up there?

A. About fifty minutes.

Q. 475. Why did it take you so long?

A. I couldn't walk good. Mr. Beavers told me to get it off.

Q. 476. What energy does it require to remove that derail? That is, what do you have to do, Carl?

A. Just throw a little—it's like a switch, but it's smaller than a switch. You just really push it over. It fits up at an angle like that (indicating).

Q. 477. Does it take much strength to remove it? Much [fol. 758] pressure applied?

A. No, sir.

Q. 478. And you say you think you marked off on the second of February?

A. I'm not sure.

Q. 479. But you think you did?

A. Yes, sir.

Q. 480. Have you ever, Carl, worked any since—that is, have you ever done any physical labor since the twenty-third day of January, 1958?

A. No, sir.

Q. 481. Have you earned any money?

A. No, sir.

Q. 482. Now, during the time from sometime around the twenty-third and twenty-fourth of January, as I understand you, you were taking these physiotherapy treatments?

A. Yes, sir.

Q. 483. How long did you take them?

A. I taken them up until on the thirteenth of February, I went to see Dr. Gage and told him that these treatments wasn't helping me, and he—I am almost sure he X-rayed me again—I am not positive—and he got the X-rays and all that, and he was examining me and told me that—

Mr. Sanders, Sr.: We object to what he told him, Your Honor.

[fol. 759] The Court: Yes.

The Court to the Witness: Don't go into what he told you.

To which action and ruling of the Court the plaintiff, by counsed, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 484. Did he hospitalize you, Carl?

A. Yes, sir.

Mr. Walter G. Burton to Mr. Sanders, Sr.: Why do you object to what Dr. Gage said? He is the N. and W. hospital doctor.

Mr. Sanders, Sr: Dr. Gage—we have taken his deposition and he is not here, and there is nothing brought out on cross-examination on it, and he won't be able to be here as a witness. If you want to present anything that was said by Dr. Gage, you should have brought it out.

Mr. Walter G. Burton: That's true. You're right. Go ahead.

By Mr. Walter W. Burton (Continuing):

Q. 485. Did Dr. Gage hospitalize you?

A. Yes, sir.

Q. 486. What did he do after you were hospitalized? Don't say what he said. Just tell us what he did. Did he [fol. 760] continue these treatments?

A. Before I went to the hospital I was taking one physical therapy treatment a day. After I got there I was taking two a day.

Q. 487. You were taking two physiotherapy treatments a day?

A. Yes, sir.

Q. 488. And how long did that continue, if you can recall?

A. I don't know exactly the day. They write down each time you take one.

Q. 489. Right down to the time——

A. The nurse at the hospital write down each time you go for one, and that is the onliest way I world know to find out.

Q. 490. Did Dr. Gage demand or did he attempt or do any other service to you?

A. He would come in around nine or nine-thirty where I was in bed——

Mr. Walter G. Burton to the Witness: Don't say what he said, now. That's what you are fixing to do. Don't say what Dr. Gage said. He came in periodically, is that correct, into your room?

By Mr. Walter W. Burton (Continuing):

[fol. 761] Q. 491. Daily?

A. Yes, sir. I can't tell it like it was?

Mr. Walter G. Burton to the Witness: No.

By Mr. Walter W. Burton (Continuing):

Q. 492. The Court won't permit you to say what Dr. Gage said. You can tell what happened. He came into your room?

A. Yes, sir.

Q. 493. He came into your room daily?

A. For three days.

Q. 494. On the third day what did he do? Did he have you sent anywhere?

A. I can tell that?

Mr. Walter G. Burton to the Witness: Not what he said, Carl.

By Mr. Walter W. Burton (Continuing):

Q. 495. Not what he said; just where he had you sent.

A. I don't know how to tell half a story, but I'll try.

The Court to the Witness: Tell where you were sent.

By Mr. Walter W. Burton (Continuing):

Q. 496. Carl, were you sent to the operating room?

[fol. 762] A. Yes, sir.

Q. 497. And did Dr. Gage attempt to perform some act there on you?

A. I can tell that?

Q. 498. No, just say whether or not he attempted to operate on you or do something to you.

A. Yes, sir.

Q. 499. Would you let him do it?

A. No, sir.

Q. 500. Now, Carl, don't say what Dr. Gage said, but had Dr. Gage ever told you you were going to be taken into the operating room until you got there?

A. I never knew I was going until after we had this talk on the third day.

Q. 501. Go ahead. Don't say what he said.

A. I talked with Dr. Gage on the third day I was in the hospital, and when he left the ward I was in—well, when I know anything else, the orderly—if that's what you call them——

Q. 502. Yes.

A. (Continuing)—he came in and got me and taken me to the operating room.

Q. 503. Had anybody told you—had Dr. Gage or anybody else told you you were going to that operating room?

A. The orderly told me when he got there.

Q. 504. When you got there?

[fol. 763] A. Yes, sir.

Q. 505. All right. Did anybody tell you prior to the time you got to the operating room that you were going to be operated on?

A. Before I got there?

Q. 506. Before you got up there.

A. No, sir.

Q. 507. O.k. Now, as I understand it, Dr. Gage did not operate on you; is that correct?

A. That's correct.

Q. 508. How much longer did you remain at the hospital, if you can recall, Carl?

A. I was in the hospital all told—I don't know exactly—I think seven or eight days.

Q. 509. Seven or eight days?

A. Yes, sir.

Q. 510. After you had been to the operating room were you still receiving these physiotherapy treatments?

A. Yes, sir.

Q. 511. What was your condition as to pain and suffering for the entire period that you were in the hospital?

A. I seemed to be hurting even worse.

Q. 512. Did you see any other doctor after Dr. Raub—or Dr. Gage had you in the operating room?

A. I saw Dr. Raub one day, I was going to take physical therapy, and talked to him.

[fol. 764] Q. 513. What did Dr. Raub tell you, if anything?

A. I just talked with him about a talk Dr. Gage and I had had and asked him could I come to him.

Q. 514. And what did Dr. Raub tell you?

A. He told me I was Dr. Gage's patient and he couldn't just tell me to come to him like that.

Q. 515. After you were discharged from the hospital did you go to see Dr. Raub?

A. The next day.

Q. 516. The next day after you got out?

A. Yes, sir.

Q. 517. And did Dr. Raub examine you?

A. Yes, sir.

Q. 518. And what did Dr. Raub recommend that you do, if anything?

Mr. Sanders, Sr.: We object to this. If they want to call Dr. Raub to testify on this, all right. We will object to these conversations.

Mr. Walter G. Burton: That's their doctor, not our doctor. Dr. Raub is one of the N. and W. doctors.

Mr. Sanders, Sr.: He is not our doctor at all.

The Court: I'll sustain what the doctor told him.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

[fol. 765] Mr. Sanders, Sr.: If they want to call Dr. Raub, he is available and they can call him as a witness. We object.

The Court: All right.

The Witness: We are leaving out the important parts.

The Court to the Jury: I instruct you, ladies and gentlemen of the jury, not to consider the remark volunteered by the witness, "You are leaving out the important parts."

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 519. Do you know this gentleman sitting over here?

A. I do now, yes, sir.

Q. 520. Who is that?

A. Mr. Danner.

Q. 521. Sometime after February 20th, did you have a discussion with Mr. Danner, in 1958?

A. Yes, sir.

Q. 522. And what did you tell Mr. Danner, or what did he tell you, either way?

Mr. Sanders, Sr.: What is the purpose of this, Your Honor?

Mr. Walter G. Burton: Well, he sent him to the Lewis-[fol. 766] Gale Hospital, Mr. Danner, the N. and W. claim agent. That's what we are going to show.

The Witness: Yes, sir.

The Court: Just ask him if he did that.

By Mr. Walter W. Burton (Continuing):

Q. 523. Did Mr. Danner send you to the Lewis-Gale Hospital in Roanoke?

A. Yes, sir; he told me there would be a letter there when I got there, for me to catch the train.

Q. 524. For you to go to the Lewis-Gale?

A. Yes, sir.

Q. 525. What doctor did he tell you to see at the Lewis-Gale?

A. Dr. Fisher.

Q. 526. And is it your understanding that Dr. Fisher is a Railroad doctor?

A. I understand that now.

Q. 527. All right. When did you go to the Lewis-Gale, if you can recall, Carl?

A. I went down there twice. He sent me down there twice.

Q. 528. The first time you went, when was it?

A. I'm not sure, but I think it was the twenty-eighth of February.

Q. 529. And how long did you stay that time?

[fol. 767] A. One day.

Q. 530. Who did you see?

A. Dr. Fisher.

Q. 531. Did he examine you?

A. Examined me and X-rayed me.

Q. 532. Did you go down there the second time?

A. Yes, sir.

Q. 533. At whose request did you return back down there a second time?

A. Mr. Danner.

Q. 534. Is that the same Mr. Danner that sits over here?

A. Yes, sir.

Q. 535. Is he the claim agent for the Norfolk and Western Railroad Company?

A. He told me he was.

Q. 536. All right, sir. When you went down there the second time, how long did you stay, if you can recall?

A. Twelve or thirteen days.

Q. 537. What kind of treatment did you receive, if any?

A. To start with the first?

Q. 538. When you first got down there.

A. When I first got there, they put me on a table about the length of that one (indicating); it divided in half, the table cut in two; and they would pull me down at the waist

—tie you up like you tie up your shoes, and a rope come across up under my arm across my chest, and he walked [fol. 768] around to a little door and he pushed a switch, and the table would stretch back and forth like that (indicating).

Q. 539. Now, what effect did that have on you, if any?

A. He pulled me—I don't think he pulled me but once, or twice at the most, and I hollered out and he cut it off. And he asked me was it bothering me, and I said I couldn't stand it, and he told me he would have to give me another treatment besides that.

Q. 540. What kind of treatment did he give you?

A. They taken me back to my bed and put adhesive tape down the side of my leg——

Q. 541. Which leg?

A. Left leg. (Continuing)—with a cardboard this much square on the bottom with a hole in it and a strap tied to it with a piece of iron hanging over the edge of the bed, and they had the bed shaped up and down like that (indicating) with wood under it.

Q. 542. Was that traction, Carl, that they were putting you in?

A. Yes, sir; and I stayed in that for about eleven or twelve days, something like that; I don't know exactly.

Q. 543. Did that help you any?

A. No, sir, it didn't help me, but the doctor had to keep me in that position, he said, until he got some man down at [fol. 769] Roanoke to come there to the hospital to make me a brace.

Q. 544. Did they make you a brace?

A. Yes, sir.

Q. 545. What kind of a brace is it, Carl?

A. What kind?

Q. 546. Yes, what kind. What is it made out of?

A. I have the brace on.

Q. 547. All right; let's show it to the jury here.

Mr. Walter W. Burton to the Court: Your Honor, we would like to show this brace to the jury if we can do it, please, sir.

Mr. Walter W. Burton to the Witness: Stand up, Carl. Come down here.

At this point, with the help of Mr. Walter W. Burton,

the witness left the witness stand and stood in front of the jury box; he then removed the necessary clothing to expose his waist and the brace in question.

Q. 548. I see a brace here that has two steel rods going up and down the back, one across the top, with elastic between the two on the back, and one on each side, and then two in the front; is that right?

A. Yes, sir.

[fol. 770] Q. 549. That brace appears to be made out of leather, steel, and plastic; is that right?

A. Yes, sir.

Q. 550. Now, Carl, without taking your pants off, how does it hook down below here? Is it hooked on to you down here?

A. I have a belt like this (indicating) that runs between my legs. I have a belt like this (indicating) that goes between my legs and hooks on to each side of the brace at the bottom.

Q. 551. Is there also a steel support around your hips?

A. Yes, sir.

Q. 552. That is all part of that one continuous brace?

A. Yes, sir.

Q. 553. Now, who did you say prescribed that brace for you?

A. Dr. Fisher at Lewis-Gale.

At this point, Mr. Walter W. Burton assisted the witness in putting on the clothing which he had removed.

Q. 554. Is it necessary for you to wear this brace at all times?

A. Yes, sir.

Q. 555. Why is it necessary for you to wear it, Carl?

A. Because I can't get around at all without it. I don't [fol. 771] see where it is helping me on any, but I can't go without it.

Q. 556. Did Dr. Fisher—go ahead and have a seat there.

The witness thereupon returned to the witness chair on the witness stand.

Q. 557. Did Dr. Fisher recommend that you have any other treatment or anything else done to you, Carl?

A. The day that he discharged me, I asked Dr. Fisher how long he think I would have to wear this brace before

I would be able to go back to work, and he said, "If you go back to work, it will be a miracle, but good things do happen. But," said, "my opinion of it, you will have to go to a vocational school and take up some sort of a trade."

Q. 558. Did he say whether or not, in his opinion, you would be able to go back to work as a brakesman?

A. No, sir. He said, "Miracles do happen." That's the way he told me is if I went back it would be a miracle.

Q. 559. Who paid your hospital bills while you were at the Lewis-Gale, if you know?

A. Mr. Danner, I guess. He sent me, and I did not get a bill from them.

Q. 560. You never got a bill?

A. No, sir.

[fol. 772] Q. 561. Who paid them at the Bluefield Sanitarium, if you know, Carl?

A. I don't know.

Q. 562. Did they ever send you a bill for them?

A. No, sir.

Q. 563. What was your condition, that is, as to pain and suffering, during the time you were confined at the Lewis-Gale Hospital?

A. I felt even worse because with that weight pulling me like that, it just tore me up.

Q. 564. It didn't help you any, then?

A. It hurt me.

Q. 565. How did it hurt you?

A. My back and leg was just about killing me, and pulling me like that didn't help any.

Q. 566. Have any of these doctors, Carl, ever recommended that you have an operation?

A. Yes, sir.

Q. 567. Who has recommended that, if you can recall?

A. Just about all of them say that.

Q. 568. Have they told you what the nature of this operation is?

A. Well, I didn't ask anyone the nature of it but Dr. [fol. 773] Raub, you know, about the operation; I asked him about it.

Mr. Walter G. Burton to the Witness: Don't tell what he said.

By Mr. Walter W. Burton (Continuing):

Q. 569. Don't tell what Dr. Raub said.

A. Well.

Q. 570. Why haven't you had this operation, Carl?

A. I'm afraid.

Q. 571. Why are you afraid to have it?

A. I can't say what he told me?

Mr. Walter G. Burton to the Witness: No, you can't say what he told you.

A. (Continuing) I believe I would die if I had that operation. Regardless of how anybody else feel, I feel that way.

Q. 572. You are afraid you will die if you have it?

A. Yes, sir. I'm afraid to go to the hospital. I'm afraid.

Q. 573. Have you ever been hospitalized anywhere since you left the Lewis-Gale Hospital sometime in March or April of 1958?

A. No, sir.

Q. 574. Did you go to see Dr. Roy M. Hoover, an orthopedic surgeon, in Roanoke, Virginia?

[fol. 774] A. Yes, sir.

Q. 575. Why did you go to see Dr. Hoover?

A. That was in May. After that time I had talked to Mr. Burton there about my case, and, you know, about me being hurt and everything, and got him to look into it and see what he could do for me about it, and he sent me down there.

Q. 576. You are speaking of Mr. Walter Burton, Sr., sitting here?

A. Yes, sir, Mr. Burton there (indicating), not you.

Q. 577. Did he examine you—did Dr. Hoover examine you?

A. Yes, sir.

Q. 578. Did he take X-rays of you?

A. Yes, sir.

Q. 579. Is he the same man who has testified here previously, Carl?

A. The first day.

Q. 580. The first day?

A. Yes, sir.

Q. 581. Did you go to see Dr. B. R. Kinter in the city of Bluefield sometime in February of '59?

A. Yes, sir.

Q. 582. Why did you go to see Dr. Kinter?

A. Well, I had talked with one of the policemen over [fol. 775] there in Bluefield, and he told me that——

Q. 583. Don't say what somebody told you. Why did you go down there Carl, if you can say without saying what somebody told you?

A. I went down there because I wanted to see if he could help me. That's the onliest way I could tell it my way.

Q. 584. Did you go back to him later?

A. Yes, sir.

Q. 585. Is he the same Dr. Kinter who has testified here previously?

A. Yes, sir.

Q. 586. Have you done any work or earned any money since you were injured on the night of January 23rd, 1958?

A. No, sir, I haven't done any work, but I drawed unemployment from——

Mr. Walter G. Burton to the Witness: We are not asking about that, Carl.

The Witness: He said, "any money."

Mr. Walter G. Burton to the Witness: He asked if you earned any. He didn't ask if you drawed any Railroad retirement.

A. (Continuing) I haven't earned any money.

Q. 587. Are you now able to work, Carl?

[fol. 776] A. No, sir.

Q. 588. How much did you earn per day prior to January 23rd, 1958, as a brakesman, if you can recall?

A. Twenty-one dollars and thirty-nine cents per day.

Q. 589. How much did you earn per month approximately, if you can recall?

A. I would have to count it up per day because some months we get twenty-four days; maybe some months you just get twenty.

Q. 590. How many days a week did you usually work, Carl?

A. I worked five days every week, but you have more than four weeks in a month.

Q. 591. How many hours a day did you work?

A. I worked eight hours a day. That's what my shift

called for, but some days we maybe get ten or fifteen minutes overtime.

Q. 592. And if you got overtime, did you get paid for it?

A. Yes, sir.

Q. 593. What was the condition of your health, in your own opinion, prior to January 23rd, 1958?

A. Good.

Q. 594. Were you very strong?

A. Very, very strong.

[fol. 777] Q. 595. I think there has been a witness here by the name of Magruder, who testified that you one time picked him up by merely sticking your hands out and lifting him up; is that right?

A. Yes, sir.

Q. 596. Do you recall doing that?

A. Yes, sir. There is not but one other brakeman on the railroad stronger than I am, and there he set (indicating).

Q. 597. Who are you pointing at?

A. Palmer, that fellow back there with his arm on the bench.

Q. 598. You mean before you were hurt?

A. Yes, sir, before I was hurt. He is stronger than anyone on the railroad.

Q. 599. Do you suffer any pain and discomfort now, Carl?

A. Right at this minute, right now.

Q. 600. Where is that?

A. One leg is numb right now down to my knee. My back is killing me right now. I would like to stop a minute if you don't mind.

The Court: I don't mind. Let the jury step out a few minutes.

The Court to the Jury: Don't discuss this case. I'll call you back.

[fol. 778] Thereupon, the jury proceeded to retire from the court room.

The Court to the Jury: Just a minute. Come back just a minute.

The jury thereupon complied with the foregoing request.

The Court to the Jury: It has been suggested this might be a good stopping point for the day. We have been at it hard all day. I quite agree with that. We will just quit

until tomorrow morning at nine-thirty o'clock. Remember all the instructions you have received at the hands of the Court. Don't discuss this case in any way. Don't allow any person to say anything to you about this case. Of course, you will be revolving in your own minds, considering the evidence that has been introduced before you; but don't at any time enter upon any discussions amongst yourselves or with any member of your family or with anybody, anything concerning this case. If anyone says anything to you about it, tell them immediately you are on the jury and can't even discuss it, can't discuss it in any way. Do not read any [fols. 779-789] newspaper accounts, or should there be anything on TV or radio about this case, it is not to enter your thinking. This jury is to be guided in arriving at your verdict in this case from the evidence and from the evidence alone. Be back into court tomorrow morning at nine-thirty o'clock.

Witness stands aside temporarily.

Thereupon, it being 4:15 o'clock p.m., court adjourned until tomorrow, Thursday, the 8th day of October, 1959, at 9:30 o'clock a.m., at which time the trial of this case was resumed.

* * * * * * *

[fol. 790] CARL STILL, the plaintiff herein, heretofore introduced as a witness on his own behalf, being recalled for further examination, testified as follows:

Direct examination.

By Mr. Walter W. Burton (Continuing):

Q. 601. You are Carl Still, the plaintiff in this case, who was testifying yesterday afternoon before the recess?

A. Yes, sir.

Q. 602. And you were sworn prior to the time you started to testify?

[fol. 791] A. Yes, sir.

Mr. Walter G. Burton to the Court: Will you turn that on (referring to the microphone in front of the witness chair), please?

Mr. Walter W. Burton to the Court: Turn that on, please, Judge.

The Court thereupon turned on the microphone in front of the witness chair.

The Court: Let it warm up just a minute. (Pauses) Now, flick it and see if it is on.

The witness thereupon complied with the foregoing request.

By Mr. Walter W. Burton (Continuing):

Q. 603. I think yesterday when you had finished testifying, you were talking about your physical condition prior to the time you were injured. Is that correct, Carl, as you recall?

A. Yes, sir.

Q. 604. Now, prior to the time you were injured, had your back ever given you any pain or discomfort?

A. No, sir.

Q. 605. Had you ever received an injury to your back that you know of?

[fol. 792] A. No, sir.

Q. 606. How does your injury now affect your walking, Carl?

A. I can hardly move around.

Q. 607. Are you able to walk without wearing the brace that you demonstrated to the jury on yesterday?

A. No, sir.

Q. 608. Why aren't you?

A. I can't hold myself up without it.

Q. 609. Prior to the time—prior to the time you were injured, Carl, were you able to bend forward and touch your hands to the floor?

A. Yes, sir.

Q. 610. Can you do that now?

A. No, sir.

Q. 611. Could you stand on the ground and do a flip without putting your hands down?

A. Yes, sir.

Q. 612. Are you able to do that now?

A. No, sir.

Q. 613. Do you know Mr. A. N. Davis, who was the engineer there that night?

A. Yes, sir.

[fol. 793] Q. 614. Prior to the time you were injured on January 23rd, 1958, state whether or not you think Mr. Davis was a competent engineer.

A. No, sir.

Q. 615. Why don't you think so?

Mr. Sanders, Sr.: We object to that and move to strike it out, Your Honor.

The Court: Overruled.

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

Mr. Walter G. Burton to the witness: Go ahead.

A. Because he handled the trains rough, very rough.

Q. 616. What do you mean by "He handled the trains very rough"?

Mr. Sanders, Sr.: We object to all this line of question, Your Honor.

A. (The witness made no reply to the foregoing question.)

Q. 617. Go ahead.

A. Instead of moving the trains as other conductors—engineers do, he would slam into them, and in giving a signal to stop, he won't stop; he goes four or five-car lengths down the track or up the track, whichever way they go.

[fol. 794] Mr. Sanders, Sr.: Move to strike out the answer.

The Court: Overruled.

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 618. Who did you complain to, if you can recall?

A. My conductor.

Q. 619. And do you remember any particular conductors?

A. I complained to Paul Myles the night before I got hurt, and I have complained to Thomas A. Taylor about it before.

Q. 620. Have you ever heard others complain about him?

A. Yes, sir.

Q. 621. To the officials, that is.

A. The only officials the brakemen have is our conductor.

Mr. Sanders, Sr.: Objection.

The Court: Overruled.

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

By Mr. Walter W. Burton (Continuing):

Q. 622. Have you ever heard other brakesmen complain to any conductor——

[fol. 795] A. Yes, sir.

Q. 623. (Continuing)—about the manner in which Engineer Davis operated?

A. Yes, sir.

Q. 624. Now, Carl, yesterday when you were testifying you said that just as you were cut off from the west end of that string of cars you noticed that the board was red; is that correct?

A. Yes, sir.

Q. 625. Now, how far did you travel after the board was red before you were struck by the west end of that string of cars?

A. I'll say three car-length and a half.

Q. 626. Approximately how many feet would that be?

A. Close to a hundred and fifty feet.

Q. 627. If a train has approximately sixty cars in it, and if there are approximately sixty cars attached to an engine, as it has been said there were there that night, approximately how many feet should it take the last car on that string of cars to stop? How far would it travel before it stopped if the brakes were applied on the engine at the time the board went red?

Mr. Sanders, Sr.: We object to that.

A. It could stop——

The Court: He may answer that based on his experience as a brakeman.

[fol. 796] To which action and ruling of the Court the defendant, by counsel, at the time excepted.

Mr. Walter G. Burton to the witness: Go ahead.

A. (Continuing) He should stop within about eight foot at the most.

Q. 628. How much slack is there between these different cars, approximately?

A. About—for each car, you mean?

Q. 629. For each car in a string, approximately how much distance slack do you figure?

A. It's about six or eight inches slack between each car.

Q. 630. Approximately six or eight inches of slack per car?

A. Yes, sir.

Q. 631. Prior to January 23rd, 1958, had any official of the Norfolk and Western Railroad Company ever complained to you about the manner in which you physically did your work?

A. I don't understand you.

Q. 632. Had—prior to January 23rd, 1958, had any official—conductor, yardmaster, or any other official—of the Norfolk and Western Railroad Company ever complained to you about the way you did your work physically?

[fol. 797] A. No, sir.

Mr. Walter W. Burton to Counsel for the Defendant: You may inquire.

Cross-Examination.

By Mr. Sanders, Sr.:

Q. 1. Carl, you say you were born on May 17th, 1926?

A. Yes, sir.

Q. 2. At Arista, West Virginia?

A. Yes, sir.

Q. 3. What was your father's name?

A. Ed Still.

Q. 4. And your mother's name?

A. Lucy Still.

Q. 5. Where did you—you say how far have you been in school?

A. Eighth grade.

Q. 6. Have you ever been in high school?

A. I went to the eighth grade.

Q. 7. You have just been through eight grades?

A. Yes, sir.

Q. 8. Where did you go to school?

A. Gary, West Virginia.

[fol. 798] Q. 9. When was that? You didn't go all that time at Gary, did you?

A. Yes, sir.

Q. 10. The whole time?

A. Yes, sir.

Q. 11. The whole eight years?

A. Yes, sir.

Q. 12. At Gary?

A. Yes, sir.

Q. 13. Did your folks live up at Gary all that time?

A. Yes, sir.

Q. 14. When did you move to Bluefield—about when?

A. I came to Bluefield in 1946 or 7. I don't know.

Q. 15. 1946 or 1947?

A. I think it was '46.

Q. 16. Yes. And when you first moved to Bluefield, I believe you lived at 229 Vine Street in Bluefield?

A. Yes, sir.

Q. 17. And how long did you live at 229 Vine Street, would you say?

A. I don't know.

Q. 18. And then later you moved to 613 Yadkin Street? That's Y-a-d-k-i-n.

[fol. 799] A. Yes, sir.

Q. 19. And is that where you live now?

A. Yes, sir.

Q. 20. Now, you say you attended school at Gary for eight years?

A. Yes, sir.

Q. 21. While we are on that schooling, did you ever take any vocational training?

A. Not while I was attending school at Gary.

Q. 22. I mean later.

A. Yes, sir.

Q. 23. Where did you take your vocational training?

A. In Bluefield.

Q. 24. Where?

A. On Bluefield Avenue.

Q. 25. What school was it?

A. Mercer County Vocational School, I think.

Q. 26. How long did you go to that school?

A. Around twenty months; something like that.

Q. 27. What were you studying, preparing yourself for?

A. Auto mechanic.

Q. 28. Mechanic. Now, I believe you went into the Army in 1945?

[fol. 800] A. Yes, sir.

Q. 29. Did you enlist or were you drafted?

A. Drafted.

Q. 30. I believe you entered the Army on July 18, 1945?

A. Yes, sir.

Q. 31. You were discharged on January 31st, 1946?

A. Yes, sir.

Q. 32. Prior to the time—how old were you when you went in the Army, Carl—about how old?

A. I will have to count back and see. (Witness pauses)

Q. 33. Well, we'll figure that out. You needn't bother. We can calculate that. You were about eighteen or nineteen, something like that, weren't you?

A. I will have to count it before I can tell you exact.

Q. 34. Well, then, count back and tell us.

A. Can I borrow a pencil to count it with?

Mr. Walter G. Burton thereupon handed the witness a pencil and paper, which the witness used.

A. (Continuing) Nineteen years and two months.

Q. 35. Nineteen years and two months. Had you worked anywhere up until the time you went in the Army in 1945? Had you worked any place?

A. Yes, I had jobs at different places.

[fol. 801] Q. 36. Where did you work prior to the time you went in the Army?

A. I was working at Murray, Ohio, Manufacturing Company.

Q. 37. What kind of work did you do there?

A. Making these bomb shells.

Q. 38. Making bomb shells?

A. Yes, sir; whatever they called for.

Q. 39. How long did you work there?

A. I don't know.

Q. 40. Don't have any idea?

A. No, sir.

Q. 41. Did you take a physical examination before you started to work there?

A. As far as I know, I did.

Q. 42. Do you remember it?

A. No, sir.

Q. 43. Then after you stopped working there, you don't know how long you worked, but did you do any other work before you went into the Army that you can recall?

A. I worked a while in the mines before that job.

Q. 44. Where did you work in the mines?

A. At Landgraff, West Virginia.

[fol. 802] Q. 45. At Landgraff. What was the name of that company?

A. Vera Poca.

Q. 46. That is V-e-r-a?

A. Yes, sir.

Q. 47. (Continuing)—Pocahontas Coal Company?

A. Number three.

Q. 48. How long did you work for the Vera Pocahontas Coal Company?

A. I worked there before I went to Cleveland to work in this plant. How long, I don't know.

Q. 49. You don't know how long you worked there?

A. No, sir.

Q. 50. Have you no idea of how long you worked for the Vera Pocahontas Coal Company?

A. No, sir.

Q. 51. Did you take a physical examination before you started to work there?

A. Yes, sir.

Q. 52. Do you know the name of the doctor?

A. No, sir.

Q. 53. And you passed the examination?

A. Yes, sir.

Q. 54. Then after you stopped working—what kind of [fol. 803] work did you do for the Vera Pocahontas Coal Company?

A. Loaded coal.

Q. 55. Loaded coal. Did you have to do that with a shovel?

A. Yes, sir, and the coal was three foot high.

Q. 56. Yes. Then, of course, you were active and strong at that time, weren't you?

A. Yes, sir.

Q. 57. Then, where else did you work before you entered the Army in 1945?

A. I don't remember.

Q. 58. At the time you started working for the Vera Pocahontas Coal Company, you say you don't remember the name of the doctor that examined you. Do you remember the examination that he gave you, the kind of examination that he gave you?

A. No, sir.

Q. 59. You don't remember that. Of course, you don't remember what you said to the doctor and what the doctor said to you, do you?

A. No, sir.

Q. 60. Then, did you work any place else before you went into the Army?

A. I don't remember.

Q. 61. Then you were drafted and inducted into the [fol. 804] Army on July 18th, 1945?

A. Yes, sir.

Q. 62. And where were you sent—by the way, you passed your examination when you got into the Army, didn't you?

A. Yes, sir.

Q. 63. Where were you sent then, Carl?

A. Camp Atterbury, Indiana.

Q. 64. You were in the Army?

A. Yes, sir.

Q. 65. How long did you stay at Camp Atterbury, Indiana?

A. I don't know.

Q. 66. You have no idea?

A. No, sir.

Q. 67. Well, was it a few weeks?

A. I stayed there until they sent me somewhere else.

Q. 68. Well, where did they send you after you left Camp Atterbury?

A. Camp Crowder, Missouri.

Q. 69. Camp Crowder, Missouri?

A. Yes, sir.

Q. 70. Now, while you were at Camp Atterbury, what did you do? What kind of activity did you engage in at Camp Atterbury? Did you drill and march and perform [fol. 805] the duties of a soldier? What did you do?

A. Done what I was told to do.

Q. 71. Well, what were you told to do? I am trying to find out just what you did. Engage in military training?

A. Yes, sir, we get out and drill and walk, and so forth.

Q. 72. I see. And then you were sent to Camp Crowder?

A. Yes, sir.

Q. 73. And how long did you stay at Camp Crowder?

A. Until I finished my basic training.

Q. 74. And you did finish your basic training and you got along all right?

A. Yes, sir.

Q. 75. And then where were you sent?

A. Camp Beale, California.

Q. 76. Camp Beale, California?

A. Yes, sir.

Q. 77. Now, while you were at Camp Atterbury, were you sick or disabled at all?

A. I don't remember.

Q. 78. Well, then, so far as you know, you were not sick or disabled while you were at Camp Atterbury?

A. (The witness made no reply to the foregoing question.)

Q. 79. Do you understand?

[fol. 806] A. No, sir.

Q. 80. My question is: So far as you know and can remember, were you sick or disabled in any way at any time while you were at Camp Atterbury?

A. I don't remember.

Q. 81. Then, if you were sick and disabled, you don't have the slightest recollection of it?

A. At the present time, no, sir.

Q. 82. You mean at the present time? I don't quite understand that.

A. Well, I don't quite understand you either.

Q. 83. Well, I want you to understand me, now, Carl. While you were at Camp Atterbury taking your basic training, were you at any time sick or disabled?

A. I didn't take basic training at Camp Atterbury.

Q. 84. All right. While you were at Camp Atterbury, were you at any time sick or disabled?

A. I say I don't remember.

Q. 85. You don't say whether you were or were not, then?

A. Not as I can recall of.

Q. 86. Well, if you were sick and disabled, you would remember it, wouldn't you, Carl?

A. I have felt bad at times and don't remember them.

[fol. 807] Q. 87. But you can't remember of being sick or disabled at Camp Atterbury?

A. That's what I told you, yes, sir.

Q. 88. All right. Then you were sent to Camp Crowder?

A. Yes, sir.

Q. 89. And there is where you had your basic training?

A. Yes, sir.

Q. 90. Were you at any time sick or disabled while you were at Camp Crowder?

A. I felt bad some days at Camp Crowder.

Q. 91. What was the trouble? What trouble did you have at Camp Crowder?

A. I had a lot of trouble with my side.

Q. 92. Which side?

A. My right side.

Q. 93. Would you point out the location of the difficulty you had? Where was it in your right side?

The witness thereupon complied with the foregoing request.

Q. 94. Well, now, I am not sure that I can see that. Put your hand on the place on your right side where you had difficulty when you were at Camp Crowder.

The witness thereupon complied with the foregoing request.

[fol. 808] Q. 95. Now, that is above the belt, isn't it?

A. It depends on where you wear your belt.

Q. 96. Well, where do you wear your belt?

A. Do you want me to show you?

Q. 97. Yes.

The witness thereupon showed where he wore his belt.

Q. 98. Now, you have your belt—I am talking about your tan belt there. That's the belt that holds your trousers up?

A. My belt is over where I hurt.

Q. 99. All right. Your belt is over where you hurt?

A. Yes, sir.

Q. 100. And it was over on the right side of your body?

A. Yes, sir.

Q. 101. Now, to what extent did you have pain there at that point while you were in Camp Crowder? To what extent did you have pain there? Were you disabled?

A. I don't know how to tell you the extent of a hurt. I know my side gave me trouble.

Q. 102. Were you able to perform your duties in basic training while you were at Camp Crowder?

A. Yes, sir; I did perform them.

Q. 103. Did you lose any time on account of sickness or [fol. 809] illness or disability while you were at Camp Crowder?

A. Lose any time?

Q. 104. Yes.

A. No, sir.

Q. 105. Were you treated by a doctor while you were at Camp Crowder?

A. No, sir.

Q. 106. Then, you say you did hurt on your right side while you were at Camp Crowder?

A. Yes, sir.

Q. 107. Was that a very serious condition there or was it something trivial that didn't bother you much?

A. I don't know how serious it was, but it hurt.

Q. 108. Well, did it bother you a great deal?

A. It hurt.

Q. 109. It hurt?

A. Yes, sir.

Q. 110. How much did it hurt? Did it hurt you every day?

A. How much did it hurt?

Q. 111. I am just trying to get you to tell the jury, Carl, just how bad this pain was you had in your side. I am not trying to confuse you. How bad was this condition you had there?

A. How bad did I hurt?

[fol. 810] Q. 112. Yes, on your right side.

A. In 1945. That's a good question.

Q. 113. Well, you remember when you were taking your basic training, don't you?

A. Yes, sir; but how bad did I hurt in 1945, that's a good question.

Q. 114. Well, you would rather not answer that. If you don't want——

A. I can tell you how bad I hurt now, but I can't tell you how bad I hurt in 1945.

Q. 115. All right; I won't insist on it. Now, you were later sent to Camp Beale?

A. Yes, sir.

Q. 116. In California?

A. Yes, sir.

Q. 117. How long did you stay at Camp Beale?

A. A little over a month. I don't know exactly how long.

Q. 118. And what were you doing at Camp Beale?

A. In the Army.

Q. 119. Taking basic training?

A. No, sir.

Q. 120. What kind of work or what activities were you [fol. 811] engaging in while you were at Camp Beale, California?

A. I don't understand you.

Q. 121. What did you do while you were at Camp Beale? Did you perform military service there the month that you were there?

A. Part of it.

Q. 122. How much of it?

A. I don't know.

Q. 123. Did your back hurt you any while you were in Camp Atterbury, your back?

A. I don't remember.

Q. 124. Did your back hurt you while you were at Camp Crowder?

A. I remember having some trouble with my back in Camp Crowder.

Q. 125. You had some trouble with your back in Camp Crowder?

A. Yes.

Q. 126. Where was it—your low back?

A. I don't remember.

Q. 127. The low part of your back?

A. I don't remember.

Q. 128. Did you have trouble with your back at Camp Beale?

A. Yes, sir.

[fol. 812] Q. 129. How much trouble did you have at Camp Beale, California, with your back?

A. Not too much trouble.

Q. 130. As a matter of fact, you were in the hospital there about a month, weren't you?

A. No, sir, twenty-one days.

Q. 131. Twenty-one days. Why were you in the hospital at Camp Beale, California?

A. I went to the doctor about my side. It just felt like something was pulling in my side. And they X-rayed me and put me in one of the wards there and asked—he asked me did my back give me any trouble, and I told him it hurts a little at times——

Q. 132. Well, now, what did they ask you about your back?

A. I am telling you the best I know how.

Q. 133. All right.

A. I told him it gave me a little trouble at times and other times it didn't bother me at all.

Q. 134. Did they ask you when your back started hurting you?

A. When my back started hurting me?

Q. 135. Yes.

A. He was talking more about my side than my back.

Q. 136. I am talking about your back, now.

A. I thought you were asking me what he asked me. He [fol. 813] was talking more about my side than my back.

Q. 137. Let's talk about your back a little while, now.

A. Yes, sir.

Q. 138. I want to know what they asked you about your back and what you told them about your back.

A. He asked me did my back bother me much, and I told him at times.

Q. 139. Did they ask you how long your back had been bothering you?

A. I don't remember.

Q. 140. Did you tell them that you had been involved in an automobile accident in 1941 and that your back had been bothering you ever since that time?

A. I told them that my side had been bothering me ever since that time.

Q. 141. I didn't ask you about your side.

A. Well, I am telling you what I told them.

Q. 142. Well, didn't you tell them that you had been in an automobile accident in 1941 and your back had been bothering you ever since that time?

A. I don't know if I told them I was in an automobile accident in 1941 or not, but I told them I had hurt my side in an automobile accident, the way I understand.

[fol. 814] Q. 143. Well, were you in an automobile accident in 1941?

A. I don't remember. My mother was talking to me about it, and I don't know if it was '41, '39, or when it was.

Q. 144. Whatever it was, were you in an automobile accident?

A. Yes, sir.

Q. 145. Were you hurt in that automobile accident?

A. I say my side.

Q. 146. Were you put in the hospital?

A. No, sir.

Q. 147. But your side was hurt?

A. Yes, sir.

Q. 148. And how many other automobile accidents have you been in?

A. (The witness made no reply to the foregoing question.)

Q. 149. You have been in some more, haven't you?

A. I am going to answer you after I think it over and see if I have been in any.

Q. 150. All right, sir. You take your time, now.

A pause thereupon ensued.

A. I was in one before that.

Q. 151. Before that?

A. Not before that. I have been in one other automobile [fol. 815] accident.

Q. 152. When was that?

A. I don't know.

Q. 153. You don't know?

A. No, sir.

Q. 154. Where was it?

A. In Bluefield.

Q. 155. How long ago was it?

A. That's what I say I don't know.

Q. 156. How did it happen?

A. A boy run off from one street down to the other one.

Q. 157. Did somebody run into the car that you were in?

A. No, sir.

Q. 158. Did the driver of the car——

A. No other car was involved.

Q. 159. Well, how did it happen?

A. He run off from one street over to the other one.

Q. 160. Was that the time they run into the top of the filling station in back of the West Virginian Hotel there?

A. No, sir, we wasn't near the filling station. That's the time you were speaking of, but we wasn't near the filling station.

Q. 161. The car run down off Scott Street and ran over [fol. 816] the bank, didn't it?

A. Yes, sir.

Q. 162. When was that? How many years ago has that been?

A. I don't know.

Q. 163. Haven't you any idea?

A. I think you know because you are telling me about it. I don't know what year it was.

Q. 164. Well, I've got to ask you the questions, Carl. I can't testify.

A. You tell me what year it was and if I can remember that was the year, I'll say, yes, it was the year.

Q. 165. Was it some time after 1950? Was it while you were working?

A. Oh, it was after 1950, yes, sir.

Q. 166. It was while you were working for the Norfolk and Western, wasn't it?

A. Yes, it's been since I have been working for the Norfolk and Western.

Q. 167. How did he happen to run over—how did he happen to run over there and turn the car over?

Mr. Walter G. Burton: Just a minute. Now, we object to all these collateral issues as to how it happened. We [fol. 817] don't object to him asking this man if he was injured, where he was injured, and how he was injured; but we certainly don't want to go into every automobile accident.

Mr. Sanders, Sr.: I withdraw the question, Your Honor.

The Court: All right.

A. I wasn't injured in it. No one was injured in that accident.

Q. 168. O.k. No one was injured. Was the car torn up?

Mr. Walter G. Burton: We object to that. What is the purpose of that?

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. Didn't any of us go to a doctor or anywhere. We were standing there laughing after the wreck.

Q. 169. Was the car torn up?

A. It wasn't my car.

Q. 170. You won't tell me whether the car was torn up, will you?

A. It wasn't my car.

The Court to the Witness: Answer the question. Was the car torn up?

[fol. 818] A. I don't know. I left the car there and I went home.

Q. 171. You don't know whether the car was torn up or not, do you?

A. No, sir.

Q. 172. All right. Now, getting back to Camp Beale, you were in the Army hospital at Camp Beale, you say, for twenty-one days of the thirty days you stayed there?

A. Yes, sir.

Q. 173. And you say you were complaining of your right

side, that same pain that you were telling me about a while ago?

A. Yes, sir.

Q. 174. And the Army doctors asked you if your back hurt and you told them you had had trouble with your back?

A. I told them my back bothered me at times.

Q. 175. Now, did they ask you how long your back had been bothering you?

A. No, sir.

Q. 176. Did they ask you how bad your back had been hurting you?

A. No, sir.

Q. 177. But they did ask you about your back and you told them?

A. Yes, sir.

[fol. 819] Q. 178. And your back had been bothering you, hadn't it?

A. My back bothered me at times.

Q. 179. And it bothered you to such an extent that you had to go into the Army hospital at Camp Beale, California, didn't you?

A. I was hospitalized for my side at Camp Beale, California.

Q. 180. Were you hospitalized for your back, too?

A. I was hospitalized for my side at Camp Beale, California.

Q. 181. But my question is: Weren't you also hospitalized for a bad back that you have?

A. I was hospitalized for my side at Camp Beale, California. I was hospitalized for my side.

Q. 182. So your back had nothing to do with the hospitalization, is that what you say?

A. When I went to the doctor that sent me to the hospital, it was for my side, when I was at Camp Beale, California.

Q. 183. I see.

A. I hadn't been X-rayed yet then.

Q. 184. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?

A. Yes, sir.

Q. 185. After you got out of Camp Beale?

A. Yes, sir.

[fol. 820] Q. 186. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge, didn't they?

A. Yes, sir.

Q. 187. And do you know what—they gave you one of those?

A. Yes, sir.

Q. 188. And do you have it?

A. Yes, sir.

Q. 189. Where is it?

Counsel for the plaintiff thereupon took the paper in question from their file and Mr. Walter W. Burton handed it to Mr. Sanders, Sr.

Q. 190. You have handed me the discharge that you got——

A. Yes, sir.

Q. (Continuing)—from the Army?

Mr. Sanders, Sr.: We offer this in evidence, Your Honor.

Mr. Walter G. Burton: No objection.

The Court: It may be introduced.

The above-described paper, identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 3. 10-8-59 N.V.H."

[fol. 821] and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

Mr. Sanders, Sr.: Could we just examine this a couple of minutes, Your Honor?

Counsel for the defendant thereupon examined Defendant's Exhibit No. 3.

Mr. Sanders, Sr.: We will not at this time, Your Honor, read this entire thing. There will be a good many exhibits and we will not read all of them, but we have offered this.

The Court: Let it be introduced.

By Mr. Sanders, Sr. (Continuing):

Q. 191. Now, when you were sent to Camp Beale, you had completed your basic training, hadn't you, Carl?

A. Yes, sir.

Q. 192. And were sent to Camp Beale, California, to be shipped out?

A. Yes, sir.

Q. 193. And while you were at Camp Beale and before you got shipped out, you got in the Army hospital with this side trouble and this back trouble?

[fol. 822] A. I went to the Army hospital for my side.

Q. 194. Yes. And then you stayed in there twenty-one days, and after they had examined you, they gave you an honorable discharge and a disability discharge and you got out of the Army; you were not shipped overseas?

A. No, sir.

Q. 195. And you got out and came back home?

A. Yes, sir.

Q. 196. Now, this disability discharge which you got, that was for your back, wasn't it?

A. I don't know what it was for.

Q. 197. That was for spondylolisthesis, low back pain; that was what you got that disability discharge for, wasn't it, and don't you know that?

A. I don't know what I got it for. I know I got a C.D.D., a disability discharge, and this "spondylo" thing, I don't know what you are talking about.

Q. 198. I see. When was it——

A. (Continuing) I can't even say that word.

Q. 199. When was it, Carl, that you first gave your honorable discharge and this disability discharge to your attorneys?

A. (The witness made no reply to the foregoing question.)

[fol. 823]. Q. 200. It's been about ten days ago, hasn't it?

A. I am going to answer you; I can answer some of these questions. It hasn't been too long.

Q. 201. It hasn't been more than ten day ago, has it?

A. I won't say it was less or more, but it hasn't been too long.

Q. 202. Is that as near as you can come to it—"it hasn't been too long"?

A. Yes, sir.

Q. 203. It could have been a month ago?

A. It hasn't been too long.

Q. 204. And that is as close as you can come?

A. Yes, sir.

Q. 205. All right. Then, the point is, you were not able to perform your duties as a soldier; that's the reason you got out of the Army, wasn't it?

A. They discharged me.

Q. 206. And I say the reason you got your discharge was because they found you were not able to perform your duties as a soldier; now, isn't that the truth?

A. They gave me a ten per cent disability discharge.

Q. 207. Well, now, Carl, won't you answer my question?

A. I am answering your question the best I know how. [fol 824] Q. 208. Don't you know that the reason you got your disability discharge was that the Army doctors found that you were not able to perform your duties as a soldier? Now, won't you answer that?

A. I got a ten per cent disability discharge. That's the only way I know how to answer you. And they discharged me from the Army.

Q. 209. Well, were you able to perform your duties as a soldier while you were at Camp Beale? We will put it that way.

A. I was at Camp Beale, and not too long after I got there I was complaining with my side, and they hospitalized me and they X-rayed me, and they put me in this ward—it's nothing like a hospital you have here, Army hospitals are not.

Q. 210. Yes.

A. And we walked around and shot pool, what not, whatever recreation they have on the ward. And I was there twenty-one days and was discharged.

Q. 211. And still during that twenty-one days you weren't able to soldier, were you?

A. I wasn't soldiering. I was in the Army ward.

The Court to the Witness: What was your ten per cent disability for?

Mr. Sanders, Sr.: I am——

[fol. 825] Mr. Sanders, Sr., To the Witness: Go ahead and answer.

The Court to the Witness: What was your ten per cent disability for?

The Witness: Well, through talking with them, they told me I would have a ten per cent disability.

The Court to the Witness: For what? Side trouble, back trouble, or for what?

The Witness: I was under the impression it was for my side.

By Mr. Sanders, Sr. (Continuing):

Q. 212. All right. Now, after you got out of Camp Beale, you came back home to McDowell County?

A. Yes, sir.

Q. 213. And then how long was it before you went to work?

A. I don't remember.

Q. 214. Well, did you go to work after you came back from the Army, from Camp Beale?

A. Not the next day or two, but I did go to work; I don't know when.

Q. 215. When did you first go to work, Carl? What company did you first go to work for after you got out of the Army?

A. The first place I worked after I got out of the Army, [fol. 826] I worked at Montgomery Ward as a porter while I was going to school to take up auto mechanic.

Q. 216. You mean you went to vocational school after you got out of the Army?

A. Yes, sir.

Q. 217. And you went there for about twenty months, you say?

A. I don't know exactly. It was close to twenty months.

Q. 218. And while you were going to vocational school you worked at Montgomery Ward?

A. Yes, sir.

Q. 219. And did you later work for any coal companies before you started working for the Norfolk and Western?

A. Yes, sir.

Q. 220. Now, what coal companies, then, did you work for?

A. Peerless Coal and Coke Company.

Q. 221. That's the Peerless Coal and Coke Company at Vivian?

A. Yes, sir.

Q. 222. And what other company?

A. That's all.

Q. 223. Now, what I am asking you is to give me the names of all of the coal companies you worked for from the time you got out of the Army in 1946 until you began [fol. 827] working for the Railroad in 1951. Do you understand the question? The names of all of the companies. Do you understand?

A. (The witness made no reply to the foregoing question.)

Q. 224. Well, you did work for Peerless Coal and Coke Company at Vivian; that's one company?

A. Yes, sir.

Q. 225. And you worked for the Poca Fuel Company, didn't you?

A. Was that when I came out of the Army or before I went in?

Q. 226. After you came out. You worked for the Pocahontas Fuel Company?

A. I thought that was before I went in. I thought. I don't know.

Q. 227. I think I can give you the date. Didn't you start working for Pocahontas Fuel Company at Jenkinjones on August 21st, 1946, and quit—and worked until September 18th, 1946, which was after you came out of the Army?

A. I guess. I thought I worked over there before I went in the Army. I don't know. Maybe it was after I come out.

Q. 228. You don't deny that, do you?

A. I don't remember.

[fol. 828] Q. 229. Did the Pocahontas Fuel Company give you a physical examination when you started working for them?

A. Yes, sir, if that is when I worked. You gets an examination before you can go to work in the coal mine.

Q. 230. Do you know the name of the doctor that gave it to you?

A. No, sir.

Q. 231. Where was the examination performed on you?

A. I don't remember even being there, so I don't remember where the examination was.

Q. 232. Well, you don't know whether you were examined, then, do you?

A. I don't remember.

Q. 233. Yes. All right, now, you also worked for Koppers Coal Company, too, didn't you?

A. Since I have been out of the Army?

Q. 234. Well, I'm not sure. I am asking you. Did you ever work for Koppers Coal Company?

A. I think. Yes, I worked there a while, but I don't know when it was.

Q. 235. As a matter of fact, you worked for them on three separate occasions, didn't you, Carl—Koppers Coal Company?

A. I don't remember.

[fol. 829] Q. 236. You don't remember that?

A. No, sir.

Q. 237. Well, do you think you worked for Koppers Coal Company?

A. I don't remember when. I had a job there once. I remember that, but I don't——

Q. 238. What kind of work did you do for Koppers?

A. Was this since I have been out of the Army?

Q. 239. I'm not sure, Carl.

A. I'm not sure either; that is why I am trying to find out when.

Q. 240. I thought maybe you should know. You are the man that worked. Did you ever work for Koppers Coal Company?

A. Yes, I remember working there sometime.

Q. 241. How many different times——

A. I don't remember how many times I worked for Koppers Company. I don't remember how long I worked for Koppers Company.

Q. 242. What kind of work you did for them? Do you remember that?

A. (Witness paused) I just can't remember.

Q. 243. You don't know. About all you remember is you did work for Koppers; you don't know when you [fol. 830] worked for them, how many times you worked for them, and the kind of work you did?

A. I don't remember too much about it.

Q. 244. Did your back bother you any while you were working for Koppers Coal Company?

A. No, sir.

Q. 245. Your back cleared up after you got out of the Army, didn't it?

A. What do you mean?

Q. 246. I say, your back got all right just after you got out of the Army, didn't it?

A. My back just bothered me at times when I was in the Army.

Q. 247. I see. After you got out of the Army and got your discharge, you worked for a great many coal companies before you started working for the Norfolk and Western, didn't you?

A. I remember working at Peerless because I worked there quite some time.

Q. 248. Did you work for Winding Gulf?

A. I got a job with Winding, but I didn't work.

Q. 249. Why didn't you work?

A. I went over there and got on the man trip and went inside, and the coal was about this high (indicating), this thing here (indicating), and had about this much (indicat- [fol. 831] ing) water, and I turned around and came back.

Q. 250. But you did apply for a job and got employment there and wouldn't accept it?

A. Yes, sir, I remember that.

Q. 251. Were you examined when you got that job?

A. You are examined before you get any job in the coal mines.

Q. 252. I know, but were you examined? Do you remember whether you got an examination?

A. Yes, sir, I was examined.

Q. 253. Where were you examined?

A. Wherever they examine you. I don't remember.

Q. 254. Do you remember the name of the doctor that examined you?

A. No, sir.

Q. 255. Or what examination he made of you?

A. I don't know anything about a doctor's examination. They examine you for work, and that's all.

Q. 256. All right. Then, it is true, isn't it, Carl, that you had at various times worked for Peerless Coal and Coke Company, Vera Coal Company, you say you didn't work for Winding Gulf, you worked for Koppers, and you worked for Poca Fuel, is that right?

A. Some time or another, but I don't know exactly when. [fol. 832] Q. 257. While you were working for any of those companies, did your back bother you?

A. No, sir.

Q. 258. It didn't bother you a bit. As a matter of fact, as soon as you got out of the Army in 1946 your back pain disappeared, didn't it?

A. It bothered me at times.

Q. 259. It didn't keep you from working for these various coal companies, did it?

A. No, sir. It didn't keep me from performing my duty in the Army either. I was discharged and they gave me this certificate.

Q. 260. You wanted out of the Army, didn't you?

A. I wouldn't say I wanted out.

Q. 261. Well, now, didn't you? You didn't want to go overseas?

A. You want me to say what you want me to say, and I am not going to do it.

Q. 262. Oh, no. Oh, no. I am asking you, didn't you want to get out of the Army because then you wouldn't be sent overseas?

A. Why should I? The war was over.

Q. 263. I don't know.

A. Well, you are trying to get me to say that, but it [fol. 833] wasn't like that.

Q. 264. Well, you say it wasn't true?

A. What is that wasn't true?

Q. 265. You didn't want out of the Army. Did you want to go overseas or did you want to come back home?

A. It didn't matter.

Q. 266. It didn't matter. All right. Now, then, you started to work for the Norfolk and Western in July, 1951?

A. Yes, sir.

Q. 267. Had you ever worked for the Norfolk and Western before that time?

A. I got a job before that time, but I didn't work.

Q. 268. Well, when was it? You had a job more than once with the N. and W. before 1951, didn't you?

A. Did I?

Q. 269. How many times before 1951 did you apply to the Norfolk and Western for a job and get a job?

A. I remember once.

Q. 270. Once?

A. I remember once.

Q. 271. When was that? What year was that in?

A. I don't know.

Q. 272. Was that in 1948?

[fol. 834] A. I don't know what year it was.

Q. 273. It was after you got out of the Army, wasn't it?

A. I don't know what year it was or when it was.

Q. 274. Was it after you got out of the Army?

A. I don't know when it was or what year it was.

Q. 275. Can't you give us any idea?

A. I don't know when it was or what year it was.

Q. 276. All right. And you say you don't remember but getting the one job with the N. and W. before you started working in '51?

A. That's all I remember.

Q. 277. Yes. You don't remember, then, making application to the N. and W. for a job in 1943, do you?

A. I don't remember.

Q. 278. Don't remember that?

A. No, sir. Where?

Q. 279. At Bluefield.

A. I made application in '43 in Bluefield?

Q. 280. That's right. And took a physical examination. Do you remember it?

A. For a brakeman?

Q. 281. For a laborer? For a laborer.

A. In '43?

[fol. 835] Q. 282. Yes.

A. I don't remember that.

Q. 283. You don't remember a thing about it?

A. No, sir.

Q. 284. You don't even remember making an applica-

tion. And do you remember making application to the N. and W. for employment as a laborer in 1948?

A. No, sir.

Q. 285. You don't remember a thing about it?

A. No, sir.

Q. 286. You don't know whether you did or not?

A. No, sir.

Q. 287. So, naturally, you don't remember whether you were examined or not, do you?

A. I don't remember what you are talking about.

Q. 288. I say, if you don't remember that you made the application, you wouldn't remember whether you had a physical examination or not, would you?

A. If I don't remember the application, I couldn't remember the rest of it.

Q. 289. Yes. And then later in July, 1951, you applied to the Norfolk and Western for a job as a yard brakeman?

A. Yes, sir.

[fol. 836] Q. 290. And you were given an examination then?

A. Yes, sir.

Q. 291. Where were you examined?

A. At the division office.

Q. 292. By whom?

A. Dr. Troup.

Q. 293. And what examination did he make of you? Do you remember that?

A. I don't know what you mean, what examination he made.

Q. 294. What did he do to examine you? Do you remember the examination that he made of you?

A. Yes, sir, I remember him examining me.

Q. 295. Well, what did he do in making that examination?

A. Just like yesterday, couldn't Dr. Troup tell you? That's what you told me yesterday when——

The Court to the Witness: Answer his question, please, sir.

A. (Continuing) I don't understand. I don't understand what you mean.

Q. 296. You say Dr. Troup examined you in 1951?

A. Yes, sir.

Q. 297. What did he do in making that examination?

[fol. 837] A. He was doing his job; that's all I know to tell you. He examined me.

Q. 298. He examined you?

A. Yes, sir.

Q. 299. Do you remember what you said to him and what he said to you on that occasion?

A. What he said to me?

Q. 300. Yes. Did he ask you any questions on that occasion? Did you talk to him? Do you remember what was said?

A. There was five or six in there being examined at one time.

Q. 301. But do you remember on that occasion what was said at the time by either you or Dr. Troup?

A. No, sir. He just examined us all there together.

Q. 302. You don't have any recollection of what was said at the time?

A. I don't know our conversation, no, sir.

Q. 303. And you say he examined five or six of you at the same time?

A. Yes, sir.

Q. 304. Who were these other parties that he examined?

A. Any of the fellows that were hired when I was hired.

Q. 305. What were their names?

[fol. 838] A. I don't know.

Q. 306. You don't even remember who these people were. What time of day was this examination made?

A. You know I don't know.

Q. 307. I don't believe you would. You don't even really remember the examination?

A. Yes, sir.

Q. 308. You remember that?

A. Yes, sir.

Q. 309. But you don't remember how Dr. Troup made the examination of you or just exactly what he did in making the examination, do you?

A. I remember him examining me, yes.

Q. 310. But you don't remember how he examined you?

A. I don't understand what you mean, how he examined me. Honest, I don't understand what you are talking about.

Q. 311. Well, did he take your clothes off?

A. Yes, sir, he took my clothes off.

Q. 312. All right. What else did he do? I am trying to find out what Dr. Troup did when he examined you.

A. I couldn't tell you definitely what Dr. Troup did.

Q. 313. You don't remember that?

A. I do remember him examining me.

[fol. 839] Q. 314. You remember him examining you?

A. Yes, sir.

Q. 315. And how long were you in there at the time he examined you?

A. I don't know how long. It wasn't very long, but I don't know exactly how long it was.

Q. 316. But you couldn't tell us. And you don't remember what you said to the doctor or what the doctor said to you?

A. He didn't say anything to me direct. He talked with all of us when he talked to us.

Q. 317. Yes. What did he say?

A. I don't remember our conversation, but he talked to us.

Q. 318. And you don't remember what you said?

A. No, I wouldn't remember that now.

Mr. Sanders, Sr., to the Witness: All right.

At this point, Mr. Sanders, Sr., looked through his file.

Q. 319. You did—did you make out an application for employment, Carl, or do you remember?

A. What do you mean? If you show me, I might know.

Q. 320. I say, did you fill out an application? I am try-[fol. 840] ing to see if you remember it first. Did you fill out an application for this job you got in 1951?

A. I asked Mr. Berry for the job.

Q. 321. And did he give you a paper to fill out?

A. (The witness made no reply to the foregoing question.)

Q. 322. Is that your handwriting and your signature on that application?

A. Yes, sir, that's my handwriting. Yes, sir, that's my handwriting.

Q. 323. Now, that's dated down at the bottom there—you see the date on it? That's dated July 24th, 1951; see?

A. Yes, sir.

At this point, Mr. Sanders, Sr., showed the application in question to counsel for the plaintiff.

Q. 324. Now, you did fill out this application entirely in your own handwriting and sign it, didn't you?

A. Yes, sir, that's my handwriting.

Q. 325. The whole thing is in your handwriting?

A. I didn't look at all of it.

The witness thereupon again examined the application in question.

A. (Continuing) Yes, sir, all this is in my handwriting.

[fol. 841] Q. 326. Now, look on the back. There is some on the back.

A. This is not my handwriting, this right here. I signed this.

Q. 327. You signed that on the back?

A. Yes, sir, that's all.

Q. 328. You say this "Bluefield, July 24, 1951" on the back is not in your handwriting?

A. This is the only thing that is my handwriting.

Q. 329. On the back side, the only thing that is in your handwriting is the name, "Carl Still"?

A. Yes, sir.

Mr. Sanders, Sr.: We offer this in evidence, Your Honor.

The Court: Let it be introduced.

The application dated July 24th, 1951, identified by the witness, was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 4 10-8-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

[fol. 842] Mr. Walter W. Burton: I didn't understand you. Did he say he filled out all the front or part?

Mr. Sanders, Sr.: He said he filled out everything on the

front of it, and the only thing on the back that is in his handwriting is his signature, "Carl Still."

By Mr. Sanders, Sr. (Continuing):

Q. 330. Now, Carl, in this question number nine on this application, it says, "Education." You see where it says, "Education" there, number nine?

A. Yes, sir.

Q. 331. Now, you gave the answer there, "Grade School 9 years; High School 2 years." That made eleven years of school. Was that true?

A. I went two months in the ninth grade. I don't understand a whole lot of things, but some of the things I understand. Can I see that again?

Q. 332. Yes.

A. I think Mr. Burton will tell you I told him I went to school two months in the ninth grade.

At this point, the witness again examined the application in question.

[fol. 843] A. (Continuing) Gary High School, when you are in the eighth grade, you have had two years of high school. The first to the sixth is in grade school, and the sixth to the twelfth is in high school at Gary High School where I went. That's what I got down here, "High School 2 years."

Q. 333. Well, you have down here, "Grade School 9 years; High School 2 years," don't you?

A. Yes, sir, that's what it is. High school is two years at Gary. There are six in each school; there is two different schools.

Q. 334. And then they asked you, "Give record of all previous employment in date order," and you put only one company down here, Peerless Coal Company, at Vivian.

A. That was my previous employment.

Q. 335. You had worked for several other companies prior to that time?

A. Your previous employment, the way I understand it, is the job you had before you came there.

Q. 336. Question number ten says, "Give record of all previous employment in date order."

A. You mean I should put down when I used to deliver papers and everything?

Q. 337. You read that when you filled it out, didn't you?

[fol. 844] A. "Previous" meant the job I had before I came to the Railroad. That was my understanding.

Q. 338. But you didn't put down but one company, and that was Peerless Coal Company?

A. I was only working for one company when I came to Peerless.

Q. 339. Question eleven, it says, "Give military service and state whether honorably or dishonorably discharged or given a medical discharge." You answered it, "U. S. Army, honorable discharged," didn't you?

A. I was honorable discharged.

Q. 340. But you knew you got a medical discharge, too, didn't you?

A. I was honorable discharged. That's the type of discharge I got, honorable discharge. It's wrote on there.

Q. 341. And a medical discharge, too, didn't you?

A. I didn't get but one discharge.

Q. 342. But you knew you had gotten a medical discharge, didn't you?

A. I got one discharge. On the top is "Honorable Discharge." The first thing they wrote is "Honorable Discharge."

Q. 343. You read this question and they asked you to state whether you were honorably or dishonorably dis-

[fol. 845] charged or given a medical discharge, and you did not put in there that you got the medical discharge, did you?

A. I put down the kind of discharge I understand I have, honorable discharge.

Q. 344. You were not trying to keep from the Norfolk and Western the fact that you had gotten a disability discharge from the Army, were you?

A. I didn't have anything to keep from the Norfolk and Western.

Q. 345. I see. Now, number fourteen question here was, "Have you ever been injured? If so, when and at what place." You answered that, "No," didn't you?

A. Yes, sir.

Q. 346. Well, you had been injured in an automobile accident and hurt your side?

A. I don't remember this accident. My mother told me about this accident. I don't remember it myself.

Q. 347. But you knew it when you filled out this paper, didn't you?

A. How can I tell them, and tell the truth, that I know how I done it?

Q. 348. But you knew you had—now, wait a minute. You knew you had been injured and you had hurt your [fol. 846] side, and you knew you had been having trouble in the Army with that side, and you said that's one of the reasons you went to the hospital; and yet in this application you answered that, "No," didn't you?

A. I was well. They cut my check off. I was well when I went to the Railroad.

Q. 349. Let's get back to the question, Carl.

A. O.k. I am going to answer the——

Q. 350. Why did you put "No" there when they asked you if you had ever been injured? Why did you put "No"? Why didn't you tell the truth and say, "Yes"?

A. Because I put "No" there, I wasn't hurting. That's why I put "No" there. Nothing was bothering me.

Q. 351. Nothing was bothering you at that time?

A. No, sir.

Q. 352. And then question seventeen here is, "What is the general condition of your health at present?"

A. Good.

Q. 353. You said, "Good"?

A. Yes, sir.

Q. 354. All right. Now, right there, isn't it a fact that in 1947, the year following your discharge from the Army, that you made application to the Veterans Administration for hospitalization for your back, in 1947? Isn't that right?

A. I don't know. I might have and I might not.

[fol. 847] Q. 355. Don't you remember that? Were you having any trouble with your back in 1947?

A. Not to amount to anything. My side had quit hurting me some, too.

Q. 356. But, Carl, don't you know that in 1947 you made application to the Veterans Administration for hospitalization on account of your low back condition that was causing you a lot of trouble then? Don't you know that?

A. I didn't tell them anything about my lower back as I can remember, what you are talking about.

Q. 357. Then you deny that you did make application to the Veterans Administration for hospitalization on account of your back? Do you deny it?

A. I don't remember.

Q. 358. Do you admit it?

A. I say, I don't remember.

Q. 359. You don't remember. All right. Then I'll ask you if, in 1947, if you didn't take the Veterans Administration papers that you got from the office in Bluefield, and take them up to Dr. Karl E. Weier in the Bluefield Sanitarium Clinic, and if he didn't examine you for the purpose of determining whether or not you should be hospitalized.

A. I don't even know Dr. Weier.

Q. 360. Do you deny that you did go to Dr. Weier's office——

A. I don't know Dr. Weier as I know of.

[fol. 848] Q. 361 (Continuing) —in 1947?

A. I can't hardly remember 1958.

Q. 362. You don't know Dr. Weier?

A. No, sir, I don't.

Q. 363. And you don't remember making application to the Veterans Administration for hospitalization for your back in 1947?

A. I can't remember back that far.

Q. 364. And you don't even know Dr. Weier?

A. No, sir. If he is in here right now, I wouldn't know.

Q. 365. You don't know if you went up to his office and whether he examined you or not?

A. No, sir, I don't.

Q. 366. Well, after you got out of the Army in 1945, you did apply for a pension, didn't you?

A. I thought I applied before I got out. I don't know.

Q. 367. Well, when did you make an application for——

A. I say, I don't know.

Q. 368 (Continuing) —for a pension?

A. I don't know.

Q. 369. You don't know?

A. No, sir.

Q. 370. And what reasons did you give for applying for

this pension? Was it the fact that you had a low back dis-
[fol. 849] ability?

A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a disability discharge, you get a check, or something. They tell me about it in the Army. I don't know.

Q. 371. Anyway, you did get your pension and you collected it for about three years?

A. I don't know exactly how long.

Q. 372. Well, was it about three years?

A. I say, I don't know exactly how long, but I can find out.

Q. 373. Can you estimate it?

A. No, sir, I won't estimate it, but I can find out definitely how long.

Q. 374. Let me finish my questions——

A. Yes, sir.

Q. 375. (Continuing) —and I'll let you finish your answers, and I believe we'll get along better.

A. Yes, sir.

Q. 376. You have no idea how long you got the pension from the Government? Was it one year?

A. I won't say how many years because I don't know; but I can give you a definite answer.

Q. 377. When?

A. I can find out.

Q. 378. Well, how long will it take you to find out?

[fol. 850] A. I'll go home and look for some papers. I'll find out.

Q. 379. But at this time, without looking at your papers, you couldn't tell me whether it was six months, two years, or three years, could you?

A. I don't know. It was more than six months, but I don't know how——

Q. 380. Was it a year?

A. I don't know how long it was. I can tell you how much I drawed, but I don't know how long it was.

Q. 381. They started off paying you eleven dollars and fifty cents a month?

A. Yes, sir.

Q. 382. That was increased, wasn't it?

A. Yes, sir.

Q. 383. To thirteen something?

A. Yes, sir.

Q. 384. And later they cut that off, didn't they?

A. Yes, sir.

Q. 385. And you know why they cut it off, don't you?

A. They told me I was well.

Q. They told you this low back trouble that you had——

A. He didn't——

Q. 387. Wait a minute; wait a minute.

A. I thought you wanted the truth. He didn't say [fol. 851] that.

Q. 388. Wait until I finish my question, Carl.

A. Yes, sir.

Q. 389. Didn't they tell you, the Veterans Administration tell you—not only tell you, but write to you and tell you that this low back disability for which you had got a pension, you had it before you got in the Army, it wasn't aggravated by Army service, and therefore you weren't entitled to the pension in the first place? Isn't that the truth?

A. What do you want me to say?

Q. 390. Any way you want to answer it.

A. I don't understand you, then.

Mr. Sanders, Sr., to the Reporter: Read it over to him.

The Reporter: (Reading from the record) "Didn't they tell you, the Veterans Administration tell you—not only tell you, but write to you and tell you that this low back disability for which you had got a pension, you had it before you got in the Army, it wasn't aggravated by Army service, and therefore you weren't entitled to the pension in the first place? Isn't that the truth?"

A. They didn't tell me anything like that.

Q. They didn't tell you anything like that?

[fol. 852] A. No, sir.

The Court to Mr. Sanders, Sr.: As soon as you finish that point, that's a convenient stopping point.

Mr. Sanders, Sr.: All right.

By Mr. Sanders, Sr. (Continuing):

Q. 392. Why did they tell you they were cutting off your pension? What reason did they give for that, that you were well?

A. I was under the impression I was well. I wasn't hurting.

Q. 393. But you were trying to get in the Veterans Hospital even during 1948 and 1949 and 1950, weren't you, Carl? You were even then trying to get into the Veterans Hospital for treatment for this low back, in '48 and '49 and 1950, weren't you?

A. I don't remember.

Q. 394. And your back—you were trying to get in there for this low back condition? Will you deny that?

A. I guess I'll have to deny that because I don't remember.

Q. 395. In other words, you have to deny it because you don't remember it?

A. I don't remember any dates about anything.

Mr. Sanders, Sr.: All right.

[fol. 853] The Court to the Jury: We will now adjourn for the noon recess. Remember all the instructions you have received at the hands of the Court. Be back into court at one-thirty.

Witness stands aside temporarily.

Thereupon, it being 12:27 o'clock p.m., court recessed until 1:30 o'clock p.m., at which time the trial of this case was resumed.

[fol. 854] Dr. William Gayle Crutchfield, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

• • • • • • •

Q. 4. Yes. You live in Charlottesville, Virginia?

A. Yes.

[fol. 855] Q. 5. What is your business or occupation?

A. I am a neurological surgeon.

• • • • • • •

Q. 10. Are you now connected in any way with the University of Virginia Hospital at Charlottesville, Virginia?

A. Well, I am Professor of Neurological Surgery and Chairman of the Department of Neurological Surgery.

Q. 11. You are a Professor in the University of Virginia [fol. 856] Medical School?

A. Yes.

Q. 12. And Chairman of the Board of Neurological Surgery?

A. No; Chairman of the Department of Neurological Surgery.

Q. 13. Chairman of the Department of Neurological Surgery. How many do you have in the Department of Neurological Surgery?

A. Well, there are three of us on the permanent staff. Then we have four residents and interns. So all together, there are eight of us.

Q. 14. Are you the senior neurosurgeon?

A. Yes.

Q. 15. And you—are you an instructor in the Virginia—University of Virginia?

A. Yes.

Q. 16. And what do you teach?

A. Well, we teach the third and fourth-year medical students.

Q. 17. What subjects—neurosurgery?

A. Yes. Of course, our biggest teaching job is teaching the postgraduate work; that is, the interns and residents.

Q. 18. You do have a rather large hospital down there, I believe. How many beds, doctor?

[fols. 857-858] A. Five hundred.

Q. 19. And you, then, do have young men, after they graduate from medical school, who come down and intern?

A. Yes.

Q. 20. And take their postgraduate work, and you are an instructor in that?

A. Yes.

. . . . . .

[fol. 859] Q. 33. At my request, did you examine Carl Still at your office at Charlottesville in the University of Virginia Hospital in the recent past?

A. Yes, I examined him on August 19th, 1959.

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[fol. 860] Q. 38. Then, you say he told you that after the accident occurred that he was picked up off of the ground and was laying down on the ground?

A. He was assisted.

Q. 39. And he was assisted away from the scene of the accident. Did he say whether or not he had been knocked off of the car, or knocked against the car, or just how the accident happened?

A. Well, I couldn't get any definite information as to what happened. He said he was hurt, but he did not— [fol. 861] I could not find out just what happened in the accident.

• • • • • • •

Q. 41. Did he complain of any pain in his low back?

A. Well, I went into that. At first he didn't say much about any pain in his back; but later on he did say he had had pain in his back ever since this injury in question.

Q. 42. Doctor, at that time did you inquire of Carl Still whether he had previously had any back trouble or any disability in his back?

A. Yes, I asked him, and he said that he had never had any trouble with his back or his leg.

Q. 43. Said he had never had any trouble with his back or his leg?

A. Yes.

• • • • • • •

[fol. 862] Q. 45. Yes. Then, what examination did you make at that time, doctor, and what were your findings?

A. Well, I examined his back and lower extremities. He was walking with a cane, and I wanted to put him flat on the examining table, and he said he couldn't rest comfortably in that position, and so I tried to keep him on his back for as short a period of time as possible. And over

his back—I already knew that he had spondylolisthesis, and in palpating his spine I could feel a depression at the point where this fifth lumbar vertebra had gone forward. There was some limitation of his leg raising, and I didn't know whether that was due to tightness of muscles or what; and it wasn't a very significant finding. His reflexes were normal, and he had impairment of sensation over the entire—I think it was his left leg——

At this point, the witness looked at his records.

A. (Continuing) —yes, the left lower extremity, up to the hip, and there was no evidence of any muscle atrophy, and both legs measured essentially the same.

Q. 46. Did that have any significance, doctor, the fact that there was no atrophy in the muscles of either leg? [fol. 863] A. Well, it's significant because if a person has a severe nerve injury, or injury to many nerves, we often find atrophy of muscles that are supplied by that nerve.

Q. 47. Muscles in the affected part wasted?

A. Yes.

Q. 48. And you found no such condition in either of Carl Still's legs?

A. No.

Q. 49. The size of the legs and the muscle tone seemed to be about the same?

A. Pardon me.

Q. 50. I say, the size of the legs were——

A. Yes.

* * * * * * *

[fol. 864] Q. 57. And you say you found that Carl Still had a spondylolisthesis?

A. Yes.

Q. 58. Which is the slipping forward of the fifth lumbar vertebra over the sacrum?

A. Yes.

Q. 59. And about what was the position of the lumbar vertebra on the sacrum? How much had it slipped?

A. Well, it was slipped about half of the diameter of the vertebra. In other words, it was over about half-way off, so to speak.

Q. 60. While we are on that, Dr. Crutchfield, is this spondylolisthesis an unusual thing? I mean, do you see it often? And what causes it? What produces this condition ordinarily?

[fol. 865] A. I don't know how frequent it is, but it is certainly not an uncommon condition. We see quite a lot of it. And it's thought to be due to a congenital weakness in the back. Sort of a freak of nature; like somebody who is born with a harelip or clubfoot. It is a break in the arch part of the vertebra, and a person may go through life with no more than that. Then, again, the vertebra might slip forward and result in a situation such as in this case.

• • • • • • • •

[fol. 866] Q. 67. Yes. Now, doctor, in examining Carl Still, and disregarding the subjective symptoms—that is, the things that he told you and the complaints that he made—could you put your finger on anything that was wrong or abnormal about him? If so, what?

A. Well, I felt this depression in his back, which represented the spondylolisthesis. Then the X-ray findings were objective.

Q. 68. Yes.

A. And—but that was all.

Q. 69. In other words, the only objective symptoms that you found, the things that you could put your finger on, to say with absolute certainty that he had, was the spondylolisthesis, which is the slipping forward of the fifth lum-

[fol. 867] bar vertebra over the sacrum?

A. Yes.

Q. 70. And the other symptoms were subjective, and in order to make your diagnosis as to them, you would have to depend upon what Carl Still told you about it?

A. That's true.

• • • • • • •

Q. 74. So that the actual condition of the spine, this spondylolisthesis, was the only thing that you could put your finger on as an objective symptom and be certain that it existed?

A. Well, that's true.

Q. 75. Doctor, from your examination of Carl Still and your examination of the X-ray pictures, could you form any opinion as to how long this spondylolisthesis had existed?

A. From the appearance of the—as well as I recall, the first pictures of the back were made about two weeks [fol. 868] after the injury of January 23rd, and I felt that—and I think it is the feeling of others—that the appearance of the bone—I mean the reaction around the bone and everything would indicate this is something that has been present for possibly many years.

• • • • • • •

Q. 77. Just assume for the purposes of the question that Carl Still had had a perfectly normal spine and was involved in an accident sufficient to dislocate that vertebra and push it forward over the sacrum in the condition in which you found it; would that accident produce any dis- [fol. 869] ability at the time the accident occurred?

A. Oh, you mean if the displacement took effect immediately?

Q. 78. Took place at the time the accident occurred.

A. Well, I think a person would have excruciating pain if that much slippage occurred at one time. It's just like having a broken back.

Q. 79. Do you think they would be able to walk away from the scene of the accident?

A. Well, he may be able to walk away from the scene of the accident, but I think he would have severe pain in his back.

Q. 80. Severe pain. He would know it at the time?

A. And probably if that much slippage took place suddenly at that level in the spine, he would have probably had trouble with his bladder and rectum and some numbness in his legs and weakness.

Q. 81. I believe you have said that many people go through life with spondylolisthesis without knowing it until it's discovered incidentally, is that correct?

A. Yes, every now and then we pick it up in a routine examination as just a coincidental finding. I don't know how many of them have symptoms.

Q. 82. And that is people that, so far as you know, have not been involved in an accident?

A. Yes.

[fol. 870] Q. 83. Doctor, in making your examination and obtaining the history, you say that Carl Still made many complaints about the condition—his condition. Were all of those complaints, doctor, in your opinion, rational and did they have—were they supported by the findings that you actually made and from your knowledge of medicine?

Mr. Walter G. Burton: We object to that because if it's ever proper to ask such a question, it certainly would only be proper to ask it to a psychiatrist. He doesn't qualify as a psychiatrist.

The Court: It will be overruled.

To which action and ruling of the Court, the plaintiff, by counsel, at the time excepted.

A. Of course, I couldn't say that Still was not having pain in his back or his leg. But I know one thing: He could not have had numbness in all of one lower extremity, nor could he have attacks of numbness from the waist down due to an injury at that level, because you can cut the spine in two at that level and you won't produce that because so many of the nerves that go into the lower extremity come out of the spine above that point. But, as I said before, I didn't question his statement regarding his pain. He told me he had pain and I took his word.

. . . . . .

[fol. 871] Q. 85. Doctor, you are familiar to some extent with the duties of a railroad yard brakeman, are you?

A. Not much.

Q. 86. A railroad yard brakeman shifts cars in the yard, rides cars, couples cars, and brakes cars, and does work of that kind. It's rather arduous work, I think we will all agree. If you had been examining Carl Still for employment of that kind and you had found him suffering with the condition that you did find him in, spondylolisthesis, would you have passed him for that employment?

A. You mean if he had told me that he had spondylolisthesis?

Q. 87. Yes, sir.

A. I don't think I would. I don't think any company would.

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[fols. 872-877] Q. 89. You would not have passed him yourself had you been the examining physician?

Mr. Walter G. Burton: We object to that. It's leading, suggestive.

The Court to the Witness: Go ahead, sir.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. Well, maybe I am biased. I don't know what other doctors—because I see so many people with back injuries, and I am conscious of back injuries, and I know the problems that they present. I certainly—if I had picked up a spondylolisthesis on an employee doing heavy work, I certainly would not have recommended him for employment.

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[fol. 878] Q. 106. One other question, doctor, and then I'm through. I want to read something to you—it's describing an X-ray report—and then I want you to tell me what this report means. Will you do that?

A. I'll try.

Q. 107. Quote: "The fifth lumber vertebra is noted farther anterior than its normal position by a distance equivalent to one half of the anterior posterior diameter of the body of the vertebra indicative of spondylolisthesis." Is the question clear?

A. Yes.

Q. 108. How would you answer that, now? What does that mean in everyday language?

A. Well, I think I have your question. It means that he had displacement whenever that was written of essentially the same as he has now. Is that what you mean?

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[fol. 879] By Mr. Sanders, Sr. (Continuing):

Q. 112. Is that substantially what you found in this man when you examined him, doctor?

A. Yes; I think any of you could look at the X-rays your-
[fols. 880-881] selves and measure the distance, and it's approximately fifty per cent.

Mr. Sanders, Sr., to Counsel for the Plaintiff: Cross-examine.

Cross-examination.

By Mr. Walter G. Burton:

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[fol. 882] Q. 14. Yes, sir. Doctor, now, this is true, isn't it: There are many pre-existing spondylolisthesises which are non-disabling, aren't they, and the people don't know about it?

A. That's true.

[fol. 883] Q. 15. That's right. Now, those things can become disabling by injury, can't they?

A. Yes.

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Q. 21. In other words, what I am trying to ask you, [fol. 884] if it isn't a fact that a lot of them are asymptomatic and are non-disabling; people don't know they have got them and they can work with them?

A. That's true.

Q. 22. That's true, isn't it? Now. But an injury, and a slight injury, can bring them into being and into existence and exaggerate them until where the person is disabled and can't work, isn't that true?

A. Well, I think you've got to rationalize that situation. What is going to cause a person to be disabled? I think that if you say that injury has disabled somebody who had a pre-existing spondylolisthesis, I think then you would have to say that that vertebra slipped at the time of the accident.

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[fol. 885] Q. 27. Before that he worked in coal mines.

A. But here is a man with a spondylolisthesis that was proven years before that and he worked in coal mines, which goes to prove it is not always symptomatic, and I think—now, I may be wrong, but—in my assumption, but right now he presents the same thing by means of X-rays [fol. 886] that he did whenever that examination was made way back in the middle forties, and there is nothing to indicate that the position of those vertebrae have changed any. I'll put it this way: I think if a person has a spondylolisthesis without fusion, but with—permitting motion, that if there is motion in the joint and a person's body is violently twisted or he is thrown down in a sitting position, the nerves would be stretched and he would have pain for some time; but I wouldn't expect then, Mr. Burton, for it to be a continuing disability unless there was something—some change in the vertebrae to call for a new evaluation of the person's disability.

Q. 28. When you are dealing with nerves, you are dealing with short distances, aren't you?

A. Yes; but nature has a way to try to overcome a defect in the body, and this slipping probably took place over a period of years and in so doing the nerves were stretched slowly, and his nerves are longer than yours and mine, and they pull out of the way. But he has no signs nor symptoms of nerve root pressure at that level.

Q. 29. He doesn't?

A. Not a one.

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[fol. 887] Q. 31. Yes. Has he got any nerves involved? In this examination, from what you examined him and what you saw on his X-rays, are there any nerves involved?

A. I think we know more about the nerves in that location than any place in the body because it's the commonest site for ruptured disks, and that presses on a nerve root and a person gets leg pain. Well, they almost always have a loss of the ankle reflex or it's reduced in activity, and they almost always have numbness over the side of the foot and ankle. This fellow has neither.

Q. 32. Has what?

A. Neither.

Q. 33. He doesn't have any nerve roots involved at all, does he? There is nothing the matter with his nerves, is there, that you could find? Is that what you tell this jury?

A. I have told the jury, and I have tried to be very plain about it.

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[fol. 888] Q. 35. Answer this question, doctor, and if you don't understand it, you tell me you don't understand it; I am not trying to confuse you or get you to say anything that you don't want to say. It is true then, as I understand you, that people do have this spondylolisthesis, which is congenital, but which is non-disabling? Now, can you answer that yes or no?

A. I answered yes a while ago.

Q. 36. Sir?

A. I have already answered that. Yes.

Q. 37. Yes. All right. Second question, now: Will you admit that a pre-existing, symptom-free, non-disabling spondylolisthesis can become a disabling and active spondylolisthesis by trauma or injury?

A. Yes.

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Q. 39. All right. And in most medical books that you [fol. 889] teach it says that—that is, spondylolisthesis does become active by trauma—doesn't it?

A. That is——

Q. 40. No. I am asking you if the books don't teach that?

A. I thoroughly agree with you because trauma can aggravate anything, Mr. Burton.

Q. 41. Yes. So it can be——

A. Sure, it can.

Q. 42. (Continuing) —brought into being by trauma?

A. Yes.

Q. 43. That is hurt or injury?

A. Yes.

Q. 44. When it hasn't hurt or been disabling at all?

A. You mean without pre-existing symptoms?

Q. 45. Yes, that's right.

A. Yes.

Q. 46. Yes. Now, you have told us what you found on this man. Is he able to do the duties of a yard brakeman now, in your opinion?

A. I just don't know.

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[fols. 890-891] Q. 49. And you still will tell the jury that you don't know whether this man is able to do the duties of a yard brakeman?

A. Well, this comes right back to the point I made a while ago. Everybody knows that this fellow did heavy work in the mines years ago when he had the same thing he has got now; so how can I say that—I have no way of knowing he is worse now than he was then. He may be; I am not saying he isn't.

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[fols. 892-893] By Mr. Walter G. Burton (Continuing):

Q. 54. Do you know of your own personal knowledge what his back was like or did you ever see it or examine it prior to August, 1959?

A. No. I know what it was like when he was X-rayed at Bluefield Sanitarium, and I have this information here, which I presume is official information, describing what we have. Now, I just don't see how we can disregard that.

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[fol. 894] Q. 61. Well, will you tell us this, doctor: Assuming that this man did his work as a yard brakeman in the city of Bluefield prior to January 23rd, 1958, in a satisfactory manner without any complaints from anybody, without his back hurting him or giving him any trouble, which was a period of five years and four months, to be exact, that he worked, and that he could work, and on that night he was thrown violently against the end of a steel coal car and his stomach hurt him immediately, his left hip hurt him immediately, his back hurt him immediately, would you say that he received an injury there which brought into being this spondylolisthesis?

A. Are you asking me if that injury caused the spondylolisthesis?

Q. 62. Yes, in your opinion did it?
A. No.

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[fols. 895-898] Q. 64. Well, now, in your report didn't you say this, and I quote: "Of course one has to consider the question of aggravation of a pre-existing condition." Still quoting: "If the patient injured his back this could have brought on or aggravated symptoms due to a pre-existing spondylolisthesis"?
A. Well, I have said that several times this afternoon.

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[fol. 899] Thereupon, it being 2:45 o'clock p.m., a recess was taken until 3:05 o'clock p.m., at which time the trial of this case was resumed.

CARL STILL, the plaintiff herein, heretofore introduced as a witness on his own behalf, being recalled for further examination, testified as follows:

Cross-examination.

By Mr. Sanders, Sr. (Continuing):

Q. 396. Now, I am asking you some more questions [fol. 900] about this application that you filled out and signed.
A. Yes, sir.
Q. 397. That's for—your application for employment in 1951.
A. Yes, sir.
Q. 398. Now, I believe it asks the question down here in eighteen: "Have you ever been convicted of a crime?" You answered that, "No."
A. Yes, sir.
Q. 399. Well, was that true?
A. I have never been convicted, but upon the advice of my lawyer I pleaded guilty, but we did not have a trial.
Q. 400. How many times have you pleaded guilty to different things?
A. Twice.

Q. 401. What was that for?
A. Maiming.
Q. 402. Maiming and what else?
A. Both was maiming.
Q. 403. Maiming?
A. Yes, sir.
Q. 404. Malicious wounding?
A. I pleaded guilty to maiming, the understanding I got [fol. 901] from my lawyer.
Q. 405. And that was in the Criminal Court of Mercer County?
A. Yes, sir.
Q. 406. You were indicted and you came in here and you pleaded guilty?
A. With the advice of my lawyer, I pleaded guilty.
Q. 407. Well, is that the only times you have been convicted?
A. I don't think I was convicted then. My lawyer told me to plead guilty to maiming, and I did.
Q. 408. Well, if you pleaded guilty, you were. But now, other than those two times, haven't you been convicted for some other crimes while you were down in McDowell County?
A. What was that?
Q. 409. Well, I'm asking you.
A. I don't remember.
Q. 410. You don't remember?
A. No, sir.
Q. 411. So far as you remember, this is the only two times that you have been convicted, is that right? The two times you have just——
A. I don't feel like I was convicted on them two. He told me to plead guilty, and I did. We didn't have a trial like this.
Q. 412. Now, then, I believe you say that——
[fol. 902] Mr. Walter G. Burton to Mr. Sanders, Sr.: Pardon me, Joe. Were you through with that line of questioning?

Mr. Sanders, Sr.: That line, yes.
Mr. Walter G. Burton: Now, Your Honor, we move the Court that you instruct the jury that the only reason that he's permitted to ask these questions about these convic-

tions is that it only affects the credibility of this witness, if it does affect it.

The Court to the Jury: That is the purpose of the showing of prior convictions, ladies and gentlemen of the jury, is that of affecting the credibility of the plaintiff here as a witness, if it does affect it. It is also admissable for contradictory purposes on the application.

Mr. Sanders, Sr.: Of course, it's a false statement in the application, Your Honor.

The Court: I say, it is also admissible for contradictory purposes on the application.

By Mr. Sanders, Sr. (Continuing):

Q. 413. Then, you say Dr. Troup examined you and four or five other fellows in the same room?

[fol. 903] A. Yes, sir.

Q. 414. You don't know who those other fellows were? Can you name any of them?

A. I would have to check back with the fellows and see whose number was close to mine at work.

Q. 415. And then, you say Dr. Troup took off your shirt and examined you. Did he strip you, take off all your clothes?

A. Yes, sir, he did.

Q. 416. Are you sure?

A. Yes, sir.

Q. 417. Take off your pants and all of your clothes?

A. Yes, sir.

Q. 418. Did he take your shoes off?

A. I remember that much; yes, he taken my clothes off and looked at us all over.

Q. 419. And then he asked you some questions, I believe, did he?

A. Asked you some questions?

Q. 420. Asked you some questions.

A. Like what?

Q. 421. Well, he asked who your mother and your father were, where you were born, didn't he? Asked you if you had ever had a hernia, didn't he?

A. I don't know about that.

Q. 422. He asked you if you had had pleurisy? You [fol. 904] don't remember him asking you those things?

A. No, sir.

Q. 423. You don't know whether he asked you those things or not, then, do you?

A. He didn't ask me those things.

Q. 424. Are you positive?

A. Yes, sir.

Q. 425. I thought you testified a while ago that you didn't remember anything that you said to the doctor or the doctor said to you.

A. I am trying to think of this the best I can and give you the best answer I can.

Q. 426. Now, this is—this is your signature to this card here, isn't it?

A. Yes, sir, that's my signature.

At this point, Mr. Sanders, Sr., showed the card in question to counsel for the plaintiff.

Mr. Sanders, Sr.: We offer this card in evidence. This is a card dated July 24th, 1951, signed by Carl Still.

The Court: Let it be introduced.

Mr. Sanders, Sr.: It's an examination by Dr. H. E. Troup.

The Court: Is that T-r-o-u-p?

Mr. Sanders, Sr.: T-r-o-u-p.

[fol. 905] The Witness: I don't remember ever seeing a card like that one before.

By Mr. Sanders, Sr. (Continuing):

Q. 427. Well, you signed it, didn't you? Isn't that your signature?

A. When we get a job, they give us a bunch of papers to sign and tell us to go down and mark up for work.

Q. 428. Isn't that your signature?

A. That's my signature, but these answers here where you have got "No" on that, I don't recall about that.

Q. 429. You don't recall one way or the other about it, then, is that right?

A. I didn't understand you.

Q. 430. I say, you don't recall anything about what the doctor said to you or what you said to him, is that your testimony?

A. What the doctor done to us was to examine us. We

signed some papers and went to the East Yard Office and marked up.

Q. 431. Where were you when you signed this card?

A. Evidently it was in his office if I signed it and you got that from the doctor.

Q. 432. Do you remember where you were when you signed it?

A. We signed several papers in his office.

Q. 433. You don't know where you were when you signed [fol. 906] this?

A. No, sir. He didn't ask us no questions. He examined us and we signed some papers and went down to Mr. Berry's office and marked up.

Q. 434. You just recollect it since you got off the stand this morning, that he didn't ask you any questions?

A. I don't understand you.

Q. 435. I asked you this morning about when Dr. Troup examined you, and you said at that time you didn't remember what he said to you or what you said to him, didn't you?

A. You said while he was examining me, what did he say to me. I don't remember. But you have got some questions with "No" there, I don't know anything about.

Q. 436. Now, I understand you to say when Dr. Troup examined you on July 24th, 1951, he didn't ask you one single question. Is that your reply?

A. I didn't set up and talk to Dr. Troup and answer those questions on that paper there.

Q. 437. What questions?

A. Whatever you've got there.

Q. 438. Did he ask you any questions at all? Did he say anything to you?

A. He examined us and give us this—look at these different lights, and things like that, and he examined us, and we signed some papers and went to the Yard Office.

Q. 439. Did he ask you any questions?

[fol. 907] A. We talked. We wasn't in there in silence as he examined me.

Q. 440. What did you talk about, you and Dr. Troup?

A. What did we talk about?

Q. 441. Yes. What did you talk about?

A. Just talk.

Q. 442. What was said? What did he say to you and what did you say to him?

A. The main thing the doctor was doing was examining us. And we signed some papers and went down and marked up for work.

Q. 443. You remember you talked to him, don't you.

A. I remember talking to that fellow back there (indicating) outside, but just talk; I don't know what we talked about; just talk.

Q. 444. Which fellow was that you are talking about?

A. That one on the end over there (indicating). I was talking with him; just everyday talk—about the ball game and what not; I don't know what it was.

Q. 445. I am not asking you about that. You said when you went down and you were examined by Dr. Troup, that you talked to Dr. Troup. Did you say that?

A. I talked with Dr. Troup. You don't walk into a doctor's office and not say, "Good morning," or "Good evening," or anything; you say something.

Q. 446. What I am trying to get, if you remember, what [fol. 908] did you say to Dr. Troup and what did he say to you?

A. Word for word, our conversation while I was in there?

Q. 447. Yes.

A. I wouldn't know. He didn't have that paper asking any questions, if that's what you mean, and I answered it.

Q. 448. You signed that, didn't you?

A. I signed a bunch.

Q. 449. Did you sign this paper I hold in my hand here?

A. I also signed that one and some more.

Mr. Sanders, Sr.: We offer this as an exhibit.

A. (Continuing) I signed some papers at the loan company and borrowed some money, but I don't know what papers I signed.

The card dated July 24th, 1951, signed by Carl Still, was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 5. 10-8-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

[fol. 909] By Mr. Sanders, Sr. (Continuing):

Q. 450. Now, Carl, I believe you also said that you went down to the Norfolk and Western and applied for a job in 1948?

A. I did not say that.

Q. 451. Well, did you do that?

A. I still don't remember.

Q. 452. You don't remember. Now, I hand you here a yellow sheet of paper, Norfolk and Western Railway Company, Form C. T. 88, and ask you if you didn't—if that isn't in your handwriting and if you didn't sign it.

A. It looks like my handwriting.

Q. 453. It's your signature, isn't it?

A. Yes, sir.

At this point, Mr. Sanders, Sr., showed the paper in question to counsel for the plaintiff.

Q. 454. Now, Carl, this is dated September 27th, 1948, and this is an application for employment with the Norfolk and Western, and you wrote that out in your own handwriting and signed it, didn't you?

A. Is it against the law to look for a job?

Mr. Walter G. Burton to the Witness: Carl, answer his questions, please.

[fol. 910] The Witness: Yes, sir.

Mr. Walter G. Burton to the Witness: Don't go into anything else, please.

The Witness: Yes, sir.

Mr. Walter G. Burton to the Witness: Just answer his questions.

Mr. Sanders, Sr.: I am trying to get information.

The Witness: Yes, sir.

Mr. Sanders, Sr.: And I am sure the ladies and gentlemen are interested, and the Court.

By Mr. Sanders, Sr. (Continuing):

Q. 455. Now, you wrote that out in your own handwriting and signed it?

A. I don't know whether I wrote it in my own handwriting or not.

Q. 456. You have already said so. Look at it again.

A. I say that looks like my handwriting.

Q. 457. Read it over carefully. I want to ask you some questions about it.

The witness thereupon complied with the foregoing request.

Q. 458. Now, do you think you wrote that out in your [fol. 911] own handwriting?

A. I think so.

Mr. Sanders, Sr.: Yes. We offer this in evidence.

The Court: Let it be introduced.

The application for employment dated September 27th, 1948, identified by the witness, was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 6. 10-8-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 459. Now, Carl, this was written out in September, 1948, and that was—and in this, under question eight here, "Education," you say, "Grade School 6 years; High School 4 years." Was that true? Under eight there. See eight? "Grade School 6 years; High School 4 years."

A. That's what it says here.

Q. 460. Well, you put that down. Was that the truth? [fol. 912] A. Two years high school.

Q. 461. Well, then, you made a false statement there, didn't you?

A. There is four years on there.

Q. 462. Why did you make a false statement? Was it just a mistake, or did you intend to do it?

A. Well, I will say it was a mistake.

Q. 463. Just a mistake?

A. Yes.

Q. 464. All right. Now, then, you put under the name of—it says here under nine, "Give record of all previous employment in date order (include Military service, if any)." See? And you answered that, "U. S. Coal and Coke Company, Gary, West Virginia," and "Vera Pocahontas, Landgraff." You didn't say anything about your military service there, did you?

A. Did I work when I filled that out?

Q. 465. I didn't ask you that. Read the question nine. You can read, can't you, Carl?

A. A little.

Q. 466. Well, read question nine and the answers you put down there. Read question nine out loud.

A. "Give record of all previous employment in date order (include Military service, if any). U. S. Coal and Coke, [fol. 913] Gary; Vera Pocahontas, Landgraff."

Q. 467. Now, you read that and understood it when you filled it out, didn't you? It says, "Give record of all previous employment in date order (include Military service, if any)." Now, why did you leave out your military service? Why didn't you put that in there?

A. I don't remember filling it out.

Q. 468. Why, you have already told the jury that you filled it out in your own handwriting and you signed it.

A. I said it looks like my handwriting. I know it's my signature because I know that.

Q. 469. And you said a while ago that you thought it was your handwriting?

A. I thought it was.

Q. 470. And you still think it is?

A. I guess.

Q. 471. Well, why did you leave out there the fact that you had been in the military service? Did you want to conceal from the Norfolk and Western Railway Company——

A. I don't have anything to conceal.

Q. 472. Did you want to conceal from the Norfolk and

Western Railway Company the fact that you had been in the Army and got a medical discharge? Were you trying to conceal that?

[fol. 914] A. I don't have anything to conceal.

Q. 473. Why didn't you put it in there then?

A. I didn't know they wanted my life history when you get papers like that.

Q. 474. You knew they wanted your previous military service.

A. They have got marks around it. I guess it is if you want to. Look and see if there isn't marks at "if any."

Q. 475. They said under ten, "Have you ever been injured? If so, when and at what place." You said, "None"?

A. Yes, sir.

Q. 476. That wasn't true, was it?

A. As far as I know, it is.

Q. 477. You had been injured; you hurt your side in that automobile accident and had trouble and were in the hospital with it in the Army?

A. I was in the Army hospital.

Q. 478. With your side?

A. Yes, sir.

Q. 479. Where you hurt it in the automobile accident, weren't you?

A. Sir? I was told I was hurt in an automobile accident.

Q. 480. Your mother told you, you testified to the jury here, you were in an automobile accident. Why——

[fol. 915] A. I testified I was told I was in an automobile accident.

Q. 481. Why didn't you put that down here in answer to question ten, Carl?

A. That I was in an automobile accident?

Q. 482. Yes. Were you trying to conceal that?

A. I don't have anything to conceal.

Q. 483. Why didn't you put it down there?

A. I didn't know they wanted my life history from birth up, because I don't know my life history.

Q. 484. Carl, why did you think they gave you this application and had you to answer these questions? Didn't you think they wanted this information?

A. I didn't think it was too important.

Q. 485. I see. You thought that they just gave you that and it wasn't important at all?

A. They wanted some questions answered and I answered them the best I could.

Q. 486. Now—you said here, in answer to question seventeen, your health was good.

A. That's what I said.

Q. 487. That's right.

A. It was good.

Q. 488. "17. My health is good." And I will ask you [fol. 916] again if during the years 1947 and '48 and '49, if you didn't make several applications and efforts to get into the Veterans Hospital for treatment for your low back.

A. No, sir; I didn't need any treatments. I might have made efforts to get in there, or something like that, but I didn't need any treatments.

Q. 489. You tried to get in, didn't you? You tried to get in the Veterans Hospital in '47, '48, and '49, didn't you?

A. No, sir; I never wanted to get into any hospital. I might have signed some papers and made a statement, true, but I never wanted to get into any hospital.

Q. 490. What do you mean by you "might have signed some papers"?

A. I talked with the fellows at the Veterans of Foreign Wars, the place in Bluefield. They say I am supposed to be drawing a check and I should see about it; and I might have went towards that procedure to see about it. I didn't want to get in a hospital. I am scared of a hospital.

Q. 491. You were just trying to get a little money, were you?

A. I didn't say that.

Q. 492. Then, do you remember whether or not you had a physical examination right after you filled out this——

A. I don't remember.

[fol. 917] Q. 493. You don't remember?

A. No, sir.

Q. 494. Of course, if you don't remember, you wouldn't know the name of the doctor that examined you, would you?

A. Don't know the name or where he examined me either.

Q. 495. And if you didn't know the name of the doctor or where you were examined, then you wouldn't remember what questions he asked you and what answers you gave, would you?

A. I don't remember going to him.

Q. 496. I say, if you don't remember that you were even examined and you don't remember the name of the doctor or where you were examined, you, of course, don't remember what you said to the doctor and what the doctor said to you?

A. I couldn't if I don't remember anything about it.

Q. 497. All right. Now, I hand you here now a card and ask you if that isn't your signature to it.

A. That's my signature.

Q. 498. That's your signature. This card indicates that Dr. Roy E. Christie examined you on September 27th, 1948, but you have no recollection of that at all?

A. No, sir.

At this point, Mr. Sanders, Sr., showed the card in question to counsel for the plaintiff.

[fol. 918] Mr. Sanders, Sr.: We offer this card in evidence.

The Court: Let it be introduced.

The card dated September 27th, 1948, signed by Carl Still, was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 7. 10-8-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 499. I believe, Carl, that you made another application to the Norfolk and Western for employment about May 25th, 1943, didn't you, or do you remember?

A. I don't remember.

Q. 500. Is this your——

Mr. Walter G. Burton: When was that date?

Mr. Sanders, Sr.: That was May 25th, 1943.

By Mr. Sanders, Sr. (Continuing):

[fol. 919] Q. 501. Is this your signature at the bottom of the card?

A. I believe. That don't look too much like my writing, but it could be.

Q. 502. Well, do you deny that it is?

A. I won't deny it——

Q. 503. You won't deny it?

A. (Continuing)—because I don't know.

Q. 504. All right. But you have—you say you have no recollection of even applying to the N. and W. for employment in 1943?

A. I asked them for a job one year, but I don't know what year it was. I remember.

Q. 505. Of course, if you don't remember making application, you don't remember being examined back in 1943, do you?

A. I don't know what year it was, but one year I went to get a job as a brakeman and the switchman sent me across the track further from where he was working, and I went over there and asked for a job, and what year, I don't know, or anything like that, and I got the job, and when I went to work they put me on a motor car and carried me down here next to Switchback.

Q. 506. How long did you work?

A. I didn't work. I got down there and he was telling me something about fill in, whatever they were telling me [fol. 920] about getting them forks, and I told him I didn't want a job like that, I wanted a job as a brakeman. That wasn't my intention. I didn't work at all.

Q. 507. Was that in 1943?

A. I don't know what year it was.

Q. 508. This card you signed here shows you applied for work as a track laborer up there, doesn't it, up under my thumb?

A. That says, "Track Laborer."

Q. 509. They gave you the job and took you down on a motor car to go to work, and you wouldn't go to work?

A. Mr. John English told me to go over there and ask for a job as a brakeman, and I went over there and the man gave me a job—he was a switchman. I found when I

got down there I wasn't hired for a brakeman and I came back, whatever year that was. I don't know when it was.

Q. 510. But you have no recollection of being examined in 1943 by Dr. Gordon, the Medical Examiner for the Railroad Company?

A. I don't remember that.

Q. 511. You say you are not sure whether that is your signature or not. Don't you know that's your signature, Carl?

A. I can't say positive that is mine.

Q. 512. Don't you think it is?

A. I can't say positive that is mine.

Q. 513. Don't you think that's your signature?

[fol. 921] A. Do you want me to say yes?

Q. 514. Yes.

A. You want me to say yes. I will say yes if you want me to, but I don't know.

Q. 515. I want what you think about it.

A. I told you I am not positive, but it could be mine. It could be mine. I don't know.

Mr. Sanders, Sr.: We offer this in evidence, Your Honor, and we will follow it up by showing the authenticity of it.

The Court: It may be introduced.

The card dated May 25th, 1943, bearing the signature "Carl Still," was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 8. 10-8-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 516. You testified that when you got out of the Army [fol. 922] they gave you a certificate of disability discharge?

A. Yes, sir.

Q. 517. Did they give you one like that?

Mr. Sanders, Sr., thereupon handed a paper to the witness who examined same.

A. I can't say I remember.

Q. 518. You don't know whether they gave it to you or not?

A. I can't say I remember.

Mr. Walter G. Burton to Mr. Sanders, Sr.: Will you let me see it a minute, Joe?

Mr. Sanders, Sr.: Yes.

The paper in question was thereupon examined by counsel for the plaintiff.

By Mr. Sanders, Sr. (Continuing):

Q. 519. You mentioned this morning that when you were given your discharge, they gave you a certificate of disability discharge?

A. Yes, sir.

Q. 520. Well, I am asking you if that isn't one of the papers you refer to.

A. I refer to those papers you brought up here at first.

Q. 521. I see. Are those the only papers you got when you got your medical discharge?

[fol. 923] A. I hadn't looked them up or anything until I brought my discharge over here and——

At this point, counsel for the plaintiff and counsel for the defendant conferred together.

Q. 522. Now—you say, now, Carl, that you did have some back trouble in the Army while you were in the Army?

A. At times.

Q. 523. At times. Had you had any of that back trouble before you went in the Army?

A. I had rheumatic fever some time during my life and——

Q. 524. And is it true that before you went in the Army you had a long spell of rheumatic fever or rheumatism in which you were confined for several months and had to sleep on your stomach? You had rheumatism in your joints and in your back, is that true?

A. Not the way you are telling it, it's not true.

Q. 525. Well, how was it, now? You tell it the way it is.

A. About the rheumatic fever?

Q. 526. And any rheumatism you might have had, now, before you went in the Army.

A. I have had to sleep on pillows across my stomach for my side, but not for the rheumatic fever. And the doctor treated me for the rheumatic fever and told me I would be all right, I would outgrow it.

[fol. 924] Q. 527. Did you have any rheumatism in your back before you went in the Army?

A. I don't know anything about rheumatism.

Q. 528. Did you tell the Army doctors out at Camp Beale in California?

A. I probably told them about the rheumatic fever I had, but where it was, I wouldn't know how to tell them about that.

Q. 529. Did you tell the Army doctors out at Camp Beale that you had had rheumatic fever in the back and in your arms and in your legs, that you had been confined to the house for several months at a time when you had to sleep on your stomach——

A. I only——

Q. 530. Wait. Did you tell them that? Did you tell the Army doctors that when they examined you out at Camp Beale?

A. Your question is so long. I don't understand. You will have to ask it again.

Mr. Sanders, Sr.: All right.

Mr. Sanders, Sr., to the Reporter: Read it.

The Reporter: (Reading from the record) "Did you tell the Army doctors out at Camp Beale that you had had rheumatic fever in the back and in your arms and in your [fol. 925] legs, that you had been confined to the house for several months at a time when you had to sleep on your stomach—— Answer: I only—— Question: Wait. Did you tell them that? Did you tell the Army doctors that when they examined you out at Camp Beale?"

A. It's a shame, but I still don't understand.

Q. 531. Well, I certainly want you to understand, now, Carl. Did you tell the Army doctors out at Camp Beale before you got in the Army that you had had rheumatism

in your back and in your arms and in your legs? Now, that's a clear question, isn't it?

A. I didn't tell them I had anything. I told them I had rheumatic fever, and it hurts you all over. Everything hurt.

Q. 532. And didn't you tell them you had been in this automobile accident in 1941 and that your back had bothered you ever since?

A. I might have told them '41.

Q. 533. Was that the truth?

A. I might have told them '41. I don't remember back to 19 and——

Q. 534. I say——

A. I don't remember back to 1946 and '45.

Q. 535. You say you might have told them?

A. I won't say I did or I didn't. I don't remember back that far.

[fol. 926] Q. 536. Well, was it true? Were you in an automobile accident in 1941 and did you hurt your back and did it bother you from then on?

A. The understanding I got from my mother was '41—'39, something; she didn't give me no definite time.

Q. 537. All right. Then after you got out of the Army, you did apply to the Veterans Administration for a pension, didn't you? You filled out the papers and applied for a pension, didn't you?

A. I thought I done that before I left California.

Q. 538. Well——

A. I thought I did. I don't remember.

Q. 539. Well, that could be. Let's see.

A. I'm not sure. I just thought I did.

Q. 540. Well, anyway, this is your signature, isn't it?

Mr. Sanders, Sr., thereupon exhibited a paper to the witness.

A. Yes, sir.

At this point, Mr. Sanders, Sr., showed the paper in question to counsel for the plaintiff.

Q. 541. Now, Carl, this does not appear to be dated, this paper, but it is stamped on here—it is stamped, "Received

February 15th, 1946, Veterans Administration, Area Office 8, Dallas." But, anyway, you signed that, didn't you?
[fol. 927] A. I never seen this paper before, but that looks like my handwriting.

Q. 542. Well, this is a copy of the original. We will have the original here tomorrow.

A. Yes, sir.

Q. 543. That looks like your signature, doesn't it?

A. It looks like it to me.

Q. 544. Now, in that application—does that look like your handwriting that you filled it out with, the rest of the application there?

The witness thereupon examined the paper in question.

A. (The witness made no reply to the foregoing question.)

Q. 545. Now, Carl, I say, did you fill that out in your own handwriting, do you think?

A. I don't remember.

Q. 546. You don't remember whether that is your handwriting or not?

A. No, sir, I don't remember the printing. I may have, but I don't remember.

Q. 547. Well, will you admit that that is your signature so we can go along and examine you on it?
[fol. 928] A. Yes, sir.

Q. 548. And I'll have the original here tomorrow and it will be easier to read. Now, in that Application for Pension or Compensation, under number two up here it says, "Nature of disease or injury on account of which claim is made and date each began." And here's your answer: "Heart flutters, rheumatism in my back and where my bones joins together. Pains in my right side, come from where I have had my ribs broken. (Last of 1941) Has got bad since I have been in the Army." Do you remember now that that's what you put in your application for a pension from the Veterans Bureau?

A. I might have. I don't remember.

Q. 549. Don't you believe that is what you put in there?

A. I might have. I don't remember.

Q. 550. In there you say, "Heart flutters, rheumatism in

my back and where my bones joins together." Well, was that the truth when you put it in that application?

A. I had this rheumatic fever and it was pretty bad when I had it. I don't remember.

Q. 551. It was bad in your back, too, wasn't it?

A. It wasn't bad in my back; it was bad all over.

Q. 552. But you had it in your back, too, didn't you?

A. I had it all over.

Q. 553. But you had it in your back, too, didn't you? [fol. 929] A. I had it all over. That's in my legs and arms and all over.

Q. 554. And back?

A. All over.

Q. 555. You hate to say back, don't you?

A. I had it all over.

Q. 556. All right. You just won't say you had it in your back?

A. My back is part of me, and I had it all over.

Q. 557. But you did say you had it in your back in your application, didn't you?

A. I don't remember.

Q. 558. And you got this compensation for some time until they cut it off?

A. Yes, sir.

Q. 559. So you knew for a good many years before you started working for the N. and W. in 1951 that you had had bad back trouble, didn't you?

A. I was under the impression that this rheumatism might have settled in my back or something like that, but I didn't know I had what you all say I've got now.

Q. 560. They didn't tell you when you were discharged from the Army, did they, that you had spondylolisthesis? [fol. 930] A. If he said that, I wouldn't know. I still can't say that.

Q. 561. But you did know that you had pretty bad back trouble?

A. Not as bad as you are saying it was.

Q. 562. Well, then, Carl, then you began working for the N. and W. in 1951?

A. Yes, sir.

Q. 563. And at that time you worked on to January 23rd, 1958?

A. Yes, sir.

Q. 564. You say you were a regular worker?

A. You mean did I hold a regular job all this time?

Q. 565. No, I asked you if you were a regular worker. You told Mr. Burton you worked five days a week, four weeks a month, and that you were one of the strongest brakemen on the railroad—at least, the Bluefield Yard here; am I correct in that?

A. I would like to hear the question again, please, sir.

Mr. Sanders, Sr.: All right.

The Reporter: (Reading from the record) "No, I asked you if you were a regular worker. You told Mr. Burton you worked five days a week, four weeks a month, and that you were one of the strongest brakemen on the rail- [fol. 931] road—at least, the Bluefield Yard here; am I correct in that?"

A. Maybe you and Mr. Burton misunderstand me. When you first get your job, you are on the extra list; you work when they call you. Now I can hold a regular job, and I was working regular at the time I got hurt.

Q. 566. Here's my question: After you got your job in 1951 and went to work as a brakeman, did you work all of the days that were available to you to work? That's what I mean.

A. I worked when they called me.

Q. 567. You worked when they called you. And that means you worked when there was work there for you to do?

A. I have never been caught out of place. Is that what you mean?

Q. 568. Yes. And during that period from July, 1951, when you were employed as a brakeman, until January 23rd, when you say you were injured, you say you were strong and able-bodied and able to perform the duties of a brakeman in a proper way, is that right?

A. Yes, sir.

Q. 569. And you were not sick during that time?

A. No, sir.

Q. 570. And you worked regularly and steadily when work was available for you to do?

A. If I was marked up I did; if I was marked off I didn't.

[fol. 932] Q. 571. What do you mean, now, if you were marked up? You mean when they called you to work?

A. No. You can't lay off on the Railroad. If you want off for something, you call them and tell them to mark your number off; and if my number was marked off, I didn't work.

Q. 572. I see. Well, during that time from July, 1951, to January 23rd, '58, you were strong and healthy and were not sick, so far as you can remember at this time?

A. Yes, sir.

Q. 573. That's the truth?

A. Yes, sir, that's the truth.

Q. 574. And you didn't lay off on account of sickness at all?

A. (Witness paused) I can't recall it right now.

Q. 575. All right. Before I forget it, Carl, now, it seems that you have made three different applications to the Railroad for work. You made one in 1951 as a brakeman and you got that job, and you worked on until '58. Then you made one in 1948 and you made one in 1943. Now, you say that either in '43 or '48 they took you down on a motor car and gave you a laborer's job and you didn't want that job and you wouldn't work?

A. That's right.

Q. 576. Now, how about the other time? Did you get any work the other time?

[fol. 933] A. I don't remember the other time.

Q. 577. Well, there was three times that you did file an application for employment and were examined and passed.

A. I don't remember the other time.

Q. 578. You don't even remember that?

A. No, sir.

Q. 579. And you don't know whether it was in 1943 or 1948 that they put you on a motor car and took you down and gave you the laborer's job?

A. I don't remember.

Q. 580. Why wouldn't you accept that, Carl?

A. Pardon.

Q. 581. I say, why wouldn't you accept the laborer's job?

A. I wanted a job braking, and Mr. English sent me to the wrong place.

Q. 582. Carl, didn't the Veterans Administration write you a letter dated March 21st, 1946, advising you that you had been given a pension of eleven dollars and fifty cents a month for spondylolisthesis?

A. I don't remember, and I don't know anything about that word until I came over here.

Q. 583. Did you get that letter?

A. I don't know.

[fol. 934] Q. You don't know whether you got it or not?

A. No, sir. I might have. It's been a long time. I don't know.

Q. 585. You might have gotten it?

A. If they say they sent it, evidently I got it, but I don't know.

Q. 586. Now, Carl, you were given proper training and instruction, weren't you, when you were put on as a brakeman for the Norfolk and Western, told how to do your work, is that right?

A. Yes, sir.

Q. 587. And you were strong and healthy and able-bodied and capable of doing that work as well as any of the brakemen on the road?

A. Yes, sir.

Q. 588. And you tried to do your job properly and avoid accidents, didn't you?

A. I did.

Q. 589. And, of course, you were trying to do that on the night that this accident occurred, weren't you?

A. The best I could.

Q. 590. Yes. Now, you got on this train, the western end of this train. Was it in motion when you got on it?

A. Yes, sir.

[fol. 935] Q. 591. It was in motion. You got on the last car, the car nearest—down toward the west?

A. Yes, sir.

Q. 592. And after you got on, somebody cut that car off?

A. Our car cutter did.

Q. 593. Yes. You got upon the brake step and you started moving on down towards the west, is that right?

A. Yes, sir.

Q. 594. And then you say—of course, you knew you had been cut off from this train, didn't you?

A. Yes, sir.

Q. 595. And you knew that when you were cut off that train was still moving, didn't you?

A. Yes, sir, it was moving when I was cut off.

Q. 596. It was still moving the last time you saw it, wasn't it—before the accident?

A. I can't tell it like that. I can tell it the way I know it.

Q. 597. Well, I think we can get it. The train was moving when you got up on it?

A. I remember that.

Q. 598. You remember that?

A. Yes.

Q. 599. You climbed up on the car, and then what did [fol. 936] you do—release the brake?

A. No, sir; we have to apply the brake.

Q. 600. You applied the brake?

A. Yes, sir.

Q. 601. And then somebody cut the car off?

A. Yes, sir.

Q. 602. And you started drifting on down towards the west?

A. Yes, sir.

Q. 603. By gravity?

A. Yes, sir.

Q. 604. And the train was moving when the car was cut off, wasn't it?

A. Yes, sir.

Q. 605. Then, the train was moving the last time you saw it before the accident occurred; now, wasn't it?

A. I can't tell it like that.

Q. 606. Well, why can't you, Carl?

A. I can tell you what happened. I was there.

Q. 607. I know that. But I am asking you a very simple question.

A. I told you I don't know how to pick over things. I

am going to answer it the best I can. I can tell it the way it happened.

Mr. Sanders, Sr.: I must insist——

[fol. 937] A. (Continuing) You get me confused when you ask me in the middle of an operation like that what did they do.

Q. 608. I am not trying to confuse you. I am trying to get it so we can understand it. I will make my question simple. You got on that car, and you knew the train was moving west when you got on there, didn't you?

A. Yes, sir.

Q. 609. Moving slowly, wasn't it?

A. It was moving west.

Q. 610. And you got on the car, up on the brake step, tightened up the brake, and then the brakeman cut your car off, is that right?

A. No, sir; the car cutter cut it off.

Q. 611. The car cutter. And at that time, when he cut that car off, the rest of the train was moving west, too, wasn't it? The rest of the train hadn't stopped, had it?

A. I can tell you what happened.

Mr. Sanders, Sr.: Your Honor, I must——

A. (Continuing) I don't understand.

The Court to the Witness: Answer it the best you can.

Mr. Sanders, Sr.: Sir?

The Court: I have instructed him to answer your questions the best he can.

[fol. 938] The Witness: I am trying, Judge.

Mr. Sanders, Sr.: These are not complicated questions, and I am trying to make it as simple as I can. I am not trying to confuse him.

The Witness: I am trying.

By Mr. Sanders, Sr. (Continuing):

Q. 612. When you got on that car, they cut it off, it started moving on to the west, and the rest of the train was coming on behind it moving to the west also; now, that's a fact, isn't it?

A. I got on the car and winded up my brake to hold the

slack back in order for him to uncouple it, and he says, "Way down." That means, knock your brake off and roll out. I knocked my brake off and was rolling out. As you knock it off, you have got to start winding it right straight back up so I can stop it when it needs to be stopped. At the time I winded the slack up on my brake, I rolled about a car-length, and I was at the conductor, and I leaned around the car so he could tell me which track to take it to. He told me to take it to track number ten, and I holler, "Shop car, head ten." I don't think I said, "Shop car." I just said, "Head ten." And I rolled about two car-length and a half, I guess, down the track, and not over two car-length and a half I was struck.

Q. 613. All right. I am going to ask you again, after [fol. 939] you got on this car, you got on and it was cut off and you started moving west, did you ever look back at the train behind you any more?

A. Yes, sir, I looked back when I was cut off.

Q. 614. Was it moving towards you?

A. Right after I was cut off, he throwed the board red, because if he keeps the board yellow for him to move the train, the next cut will be down past the conductor. They have to be cut off so the conductor can tell the brakeman where to go to. They had to throw the board red when I was cut off in order to keep the train behind.

Q. 615. I am still asking you, Carl, when you got on this car, when you started moving on to the west, if you ever looked behind you to see what the train was doing behind you. Did you or not?

A. Yes, sir, we look behind us.

Q. 616. Was it moving or stopped when you looked back there before the accident happened?

A. It had to be moving for me to be cut off.

Q. 617. It was moving. That answers my question. The train was moving behind you and you were moving?

A. Yes, sir.

Q. 618. All right. Now, you saw this train moving behind you, coming on behind you, and you took your eyes off of that train and you never looked at it again until you were hit, did you?

[fol. 940] A. Yes, sir, I looked back again. I have to

take my eyes off the train to see what the conductor is going to tell me to do with the car.

Q. 619. Did you continue to watch this train behind you as you took this car on down the track?

A. After the board is red, there is no need for me to watch it any more. I have to watch the cars in front of me.

Q. 620. And you took your eyes off the train and looked in the front?

A. Yes, sir.

Q. 621. At that time, how near was your car to the nearest car when you took your eyes off it and looked in the other direction?

A. I can't tell you exactly how far.

Q. 622. Well, about how far?

A. I can't tell you how far.

Q. 623. As far as from you to me?

A. If I had knew there was going to be an accident, I would have wrote it down. I can't tell you no definite yardage on it.

Q. 624. When your attorneys were asking you these questions, you understood them and you gave answers. You didn't have to——

Mr. Walter G. Burton: We object to that.

The Court: Yes. The objection will be sustained.

[fol. 941] To which action and ruling of the Court the defendant, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 625. But you can't tell them—you can't tell the jury how far the train was behind you when you took your eyes off of it and you never looked any more?

A. Could I tell you how we work?

Q. 626. No, I want you to answer my questions if you can, and if you can't, why, just say so.

A. Now, you wants to know how far——

Q. 627. How far this train was behind you—you say it was moving in the same direction you were—how far that train was behind you when you took your eyes off of it and didn't look back any more. How far was it away from you?

A. When the conductor told me which track to go——

Q. 628. No, I am not asking you that.

The Court to the Witness: Mr. Sanders' question—you said that you looked back and saw the car behind you was moving, and you looked up and saw the red board. You did not look back any more. Now, how far—what was the distance between the train and your car at the point at [fol. 942] which you didn't look back any more?

The Witness: I wouldn't know.

By Mr. Sanders, Sr. (Continuing):

Q. 629. You wouldn't have any idea?

A. No, sir. We never have measured anything like that.

Q. 630. You never have measured it. Would you say it would be as far as from you to me?

A. I said I wouldn't know.

Q. 631. You wouldn't have any idea. That's all the information you will give us about it?

A. We don't prepare for accidents, sir, and I wouldn't know.

Q. 632. I see. I see.

A. We try to prevent them, but——

Q. 633. All right. But anyway, when you saw the red board, you turned around and faced west, and you didn't look behind you any more, did you?

A. I won't say I didn't look any more.

Q. 634. Well, did you?

A. The conductor tell me which track to go to——

Mr. Sanders, Sr.: Your Honor, I think I am entitled to answers here.

[fol. 943] The Court to the Witness: Mr. Still, he is not asking you where he told you to go; he is asking you if you looked back any more. After you looked at the red board, did you look back any more?

The Witness: We make it the practice to work as safe as we can.

The Court to the Witness: I am not asking about any practice. I am asking if you looked back any more.

Mr. Sanders, Sr., to the Witness: After you saw the red board.

The Witness: No, sir. I'll just say I didn't.

By Mr. Sanders, Sr. (Continuing):

Q. 635. All right. Then, at the time the collision came, you were looking towards the west, is that right?

A. Yes, sir.

Q. 636. Now, what was the—I believe you say you were thrown against the car?

A. Yes, sir.

Q. 637. Striking your left hip and your left leg?

A. My left leg and thigh.

Q. 638. One side.

[fol. 944] A. Thigh.

Q. 639. Thigh?

A. Yes, sir.

Q. 640. Now, when were you thrown against the car—when the couplers met? Is that when you were thrown against the car?

A. It happened that quick. (Witness snaps his finger.)

Q. 641. You are just snapping your finger?

A. Yes, sir.

Q. 642. Is that when the couplers met?

A. That's when it happened, just like that. (Witness snaps his finger.)

Q. 643. I say, is that when the couplers met and coupled?

A. I was watching the man in front of me to give him time to get to his track. So, when the couplers met, I didn't know, because if I had known, I would have got off before they caught up with me.

Q. 644. Did you feel the couplers meet?

A. I felt this lick against the car, and it was so hard, it liked to have thrown me over in the car.

Q. 645. It was a blow that hit the car?

A. Yes, sir.

Q. 646. In other words, this train ran into the car and that's what threw you into the side of the car; is that [fol. 945] it?

A. I wouldn't have been thrown into the side of it if he hadn't hit it.

Q. 647. I am trying to find out if it was when the train hit your car—if that's when you got thrown against the side of the car. Is that it?

A. It happened just like that. (Witness snaps his finger.)

Q. 648. Now, please answer my question. Was it when the train hit your car that you were thrown against the side of the car?

A. You don't have time to decide when you were thrown against the car when an accident happens. I can't decide on that either way.

Q. 649. Answer it the best way you can.

Mr. Sanders, Sr.: Your Honor, I think I should have an answer on it. This is an important matter.

Mr. Walter G. Burton to Mr. Sanders, Sr.: You tell him what you want him to say, and I'll tell him to say it and get it over with.

The Court: I believe he is entitled to an answer, but I don't know how to instruct him.

Mr. Walter G. Burton: It is perfectly apparent that this man is as dumb as an owl, this witness, and that he is [fol. 946] answering to the best of his ability.

Mr. Sanders, Sr.: I object to that statement, Your Honor.

The Court: No one is objecting in any way about his answering.

The Court to the Witness: Mr. Still, what Mr. Sanders wants to know is a simple matter, if you can answer it, if you know. When the cars coupled, if your car was—when the train struck the car on which you were riding, is that when you were thrown against the car?

The Witness to the Court: Can I answer to you?

The Court to the Witness: You can answer to me or Mr. Sanders or anybody. That's all he wants to know.

A. When a train hit a car like that, it hit it and snatch it. That's all I know. If I had time to see how I was going to hit, I would have got off; if I had to jump from the top off, I would have.

Q. 650. Let's put it another way. You can hear couplers come together, can't you?

A. Yes, sir.

Q. 651. All right. You heard these couplers come together. They were right under you, weren't they?

A. When I "heared" something, I was hit.

Q. 652. Was it when the train coupled to the car—was

[fol. 947] that when you were thrown against the side of the car?

A. If the train hadn't coupled to my car, I would not have been thrown against the side of it.

Q. 653. Was it when the train hit your car that you were thrown against the side of the car?

Mr. Walter G. Burton: We submit that his question has been asked a dozen times; the man has answered it to the best of his ability; and we object to it.

Mr. Sanders, Sr.: I'll appeal to the record, Your Honor.

Mr. Walter G. Burton: Well, appeal to it.

The Court to Mr. Sanders, Sr.: You are entitled to receive an answer, and you may do so.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 654. Now, Mr. Still, you were standing up there on that car drifting slowly down the track?

A. Yes, sir.

Q. 655. Now, the train was behind you. You certainly know when the couplers came together, don't you? They make a noise when they come together, don't they?

A. If I come down the yard myself it makes a noise. I know what the sound of it is; I understand that.

[fol. 948] Q. 656. You could hear these couplers when they came together?

A. Yes, sir.

Q. 657. Was that when you were thrown against the side of the car?

A. When he coupled up to me, I was thrown against the side of the car. Whether it was a jerk backwards or just forward, I didn't have time to decide on.

Q. 658. You say it happened like the snap of the finger?

A. Yes, sir.

Q. 659. And when the couplers met, that is when you were thrown?

A. Yes, sir.

Q. 660. And you were thrown forward almost over into the car?

A. I almost went over into the car. It tilted me over and I was trying to hold on.

Q. 661. And then your car, after that, kept on drifting down the track a short distance, didn't it?

A. I wouldn't know.

Q. 662. It was cut loose again and you rode it on down for some little distance and then stopped it, didn't you?

A. No, sir.

Q. 663. Didn't you do that?

A. No, sir.

Q. 664. And you stayed up on the brake step and con-
[fol. 949] trolled that car until it drifted on down some little distance, and then you stopped it, and then you climbed down off of that car unassisted, didn't you?

A. No, sir, I don't remember that.

Q. 665. Yes. Well, now, you remember, now, exactly how this thing happened, don't you?

A. I remember it better than you do, how it happened. I was there.

Q. 666. You were there. Well, why was it you told Dr. Roy M. Hoover down at Roanoke, Virginia, when Mr. Burton sent you down there for an examination, that you were knocked off of the brake step and fell down and hit your back on the couplers? Why did you tell him that?

A. Do you want me to answer now?

Q. 667. Yes, sir.

A. Up until that I had talked to Mr. Burton and got him to take this, look into it for me, I was under the impression I was knocked up under the car on the ground, from the conversations the fellows had at work, and didn't know any different because I hadn't talked to any one of them until after I hired Mr. Burton to see about it for me.

Q. 668. You were under the impression, until you talked to Mr. Burton, that you had been knocked off of the car and up under the car?

A. I didn't know where I was knocked to.

Q. 669. You have just said——

[fol. 950] A. I said to the ground, or something, I didn't know, because a man say that; he told me he caught me, and I thought he caught me going under the car. Peck, the motor car man, said he thought I fell on top of the motor car.

The Court to the Witness: Give Mr. Sanders time to ask you questions.

By Mr. Sanders, Sr. (Continuing):

Q. 670. You testified a few minutes ago when you first went to Mr. Burton, you were under the impression you got knocked off of the car and up under the car. That's exactly what you said, wasn't it?

A. When—a few minutes ago?

Q. 671. Yes, a few minutes ago.

A. I didn't know where I was knocked to.

The Court to the Witness: Now, he asked you if you didn't just testify to that effect a few minutes ago.

The Witness: All I was going by was conversations fellows have told me.

The Court to the Witness: Didn't you just state that in response to a question from Mr. Sanders a few minutes ago, that when you first went over to see Mr. Burton, you were under the impression you had fallen down and hit [fol. 951] your back on the couplers?

Mr. Sanders, Sr.: No. Fallen down and was knocked under the car.

The Court to the Witness: Knocked under the car, he asked you.

By Mr. Sanders, Sr. (Continuing):

Q. 672. That is what you said a few minutes ago, wasn't it?

A. I might have. I have answered so much, I don't know. I might have.

Mr. Sanders, Sr.: I ask the reporter to go back and get the answer, Your Honor. I hate to delay the case, but I think it is important.

The Reporter: (Reading from the record) "Up until that I had talked to Mr. Burton and got him to take this, look into it for me, I was under the impression I was knocked up under the car on the ground, from the conversations the fellows had at work, and didn't know any different because I hadn't talked to any one of them until after I hired Mr. Burton to see about it for me."

By Mr. Sanders, Sr. (Continuing):

Q. 673. You did testify back there that you were under [fol. 952] the impression that you was knocked up in under the car, from the conversation that the fellows had; that's what you said, wasn't it?

A. That was one of the conversations I had. I said that.

Q. 674. Yes, you said that. Then, were you under the impression when you went down to see Dr. Hoover that you had got knocked off of the car and fallen down and hit your back on the couplers? Is that the way you thought it happened?

A. I didn't really know how it happened. I just believes things from the way the fellows I worked with was telling me. Just like the motor car man said he thought at first I was knocked on top of the motor car, but he found out it was my light. When he say that, I thought I was knocked on top of the motor car.

Q. 675. Didn't you tell Dr. Roy Hoover, a doctor Mr. Burton sent you to see down in Roanoke, that you were knocked off of the brake step and fell down and hit your back on the couplers? Did you tell him that?

A. I might have. I don't remember.

Q. 676. You don't remember what you told him?

A. I have been telling different tales about where I fell. Just from what people tell me.

Q. 677. How many different tales have you told about this accident?

[fol. 953] A. It's hard to remember a lie, so I tell what I can, the best I can, if I don't know. I didn't know all these questions was too important at the time and——

Q. 678. I say——

A. Just like now, people say, "How are you feeling?" I say, "I am doing just pretty good, I guess," and can be hurting all over. I don't feel they ask because they are interested in me. They just ask questions and I give answers.

Q. 679. Now, you have told the jury how this accident happened, haven't you, today?

A. No, sir, I haven't told them exactly how it—from the beginning to the end how everything happened, but we have talked about it, and I have told the best that I know how, you know, things concerning it.

Q. 680. You told the jury you got on this car before it was cut off, the train was moving at the time, and after you got on it, you tightened up the brake, and the brakeman cut it off, and you drifted on down for a piece, and you saw the train coming behind you, and you saw the conductor give the engineer a red board, and then you turned around and faced towards the west, and then (Mr. Sanders, Sr.: struck his hands together) when the car hit, you got knocked around on the side of the car; you have told them that, haven't you?

A. Yes, sir.

[fol. 954] Q. 681. And that's the way it happened?

A. Yes, sir.

Q. 682. Now, how many other different stories have you told about the way this accident happened? Is that the story you told Mr. Burton when you first went to see him?

A. I don't remember what I told Mr. Burton when I first went to see him.

Q. 683. And when you first went to see Mr. Burton, you didn't tell him you had had any previous back trouble, did you?

Mr. Walter G. Burton: We object to what he told us. It's confidential information.

The Court: It will be overruled in lieu of the statement of other matters.

Mr. Walter G. Burton: What did the Court say?

The Court: In lieu of other matters in the pre-trial.

Mr. Walter G. Burton: He is not asking him about any pre-trial conference, Your Honor. Is there anything in that question about a pre-trial conference?

The Court: No, sir, but I assume it will be connected up.

Mr. Sanders, Sr.: It certainly will. We are going to introduce it in evidence.

The Court: That was the only reason I will permit it to [fol. 955] come in, on the assumption it will be connected up.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 684. When was it that you first told Mr. Burton that you had had this back trouble——

Mr. Walter G. Burton: We object.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

Q. (Continuing) —before this accident? When did you first tell him that?

A. I didn't tell him that—I don't know exactly when I told him, but——

Q. 685. About ten days ago, wasn't it?

A. I don't remember when I told him. I am trying to tell you, if you will wait a minute.

Q. 686. All right.

Mr. Walter G. Burton: Of course, we want an objection to all this line of questions.

The Court: And the Court stated that he is only permitting it on the assumption that it would be connected up, state the positions heretofore taken in the pre-trial conference.

[fol. 956] To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 687. Why, you told Mr. Burton, didn't you, that—after you had employed him——

Mr. Walter G. Burton: Objection.

Q. (Continuing) —that you——

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

Q. (Continuing) —never had had any back trouble or any back disability and had never been to see a doctor except for an examination for a job, didn't you?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff by counsel, at the time excepted.

A. I told Mr. Burton I had never been treated or anything for my back, which I haven't.

Q. 688. And when was it that you first told Mr. Burton about your previous back condition?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff by counsel, at the time excepted.

[fol. 957] Mr. Walter G. Burton to the Witness: Answer, Carl.

A. When was it I first told him?

Q. 689. About your previous back condition.

A. I don't remember what day it was.

Q. 690. You were trying to conceal from Mr. Burton, your own lawyer, the fact that you had got a medical discharge from the Army on account of a bad back, weren't you?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. I wasn't trying to conceal anything.

Q. 691. And you din't tell him that until just a few days ago, until you found out we knew about it, did you?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. I've got sense enough to know if I've got any kind of records, you can get them if we go to court, and I don't have any reason to keep it from him if I thought there was something wrong.

Q. 692. Why didn't you tell him about that?

[fol. 958] Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. You will have to ask me again.

Q. 693. Why didn't you tell him about it?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. My back wasn't hurting me.

Q. 694. You mean at the time you talked to Mr. Burton?

A. Before I got hurt. I wasn't trying to conceal anything. I have sense enough to know those papers you have got, whether I remember them or not, you could get them if we go to court.

Q. 695. You know that now, don't you?

A. I knew that at first. I understand some things.

Q. 696. You went to see Dr. Isaac Gutman, a doctor up in Baltimore, Maryland, didn't you?

A. Yes, sir.

Q. 697. When did you go to see Dr. Gutman?

A. I don't know the dates.

Q. 698. It was after January 23rd, 1958, wasn't it?

[fol. 959] A. Yes, sir.

Q. 699. And you told Dr. Gutman that you never had in your life had any back trouble of any kind, didn't you?

A. I told you a few minutes ago I was under the impression that I had this rheumatism. The doctor told me I would probably outgrow it, and when my back quit hurting me, I thought I had outgrown it, and I haven't had any more trouble out of it until I got this lick.

Mr. Sanders, Sr., to the Reporter: Read the question, please.

The Reporter: (Reading from the record) "And you told Dr. Gutman that you never had in your life had any back trouble of any kind, didn't you?"

By Mr. Sanders, Sr. (Continuing):

Q. 700. Answer that yes or no, if you can, Carl. Did you tell him that or not?

A. I may have; I don't remember.

Q. 701. You don't remember. If you did tell him that, why would you tell him a thing like that?

A. I don't remember.

Q. 702. If you did tell him that, it would be a falsehood, wouldn't it?

A. Pardon?

[fol. 960] Q. 703. If you did tell him that, it was something that wasn't true, wasn't it, that you had never had any previous back trouble? I say——

A. My back didn't hurt me like you are speaking of. If it did, I couldn't have worked in the mines.

Q. 704. I say, if you did tell Dr. Gutman that you never had had any previous back trouble, why did you tell him that?

A. Because the doctor had told me I would outgrow this rheumatism, and my back wasn't hurting. When I had rheumatism, I hurt all over. Everything hurt. I couldn't hardly stand to look at daylight; it hurt that bad.

Q. 705. You didn't tell Dr. Gutman the truth, then, did you?

A. I told him the best I know how to tell the truth.

Q. 706. All right, now; you went to see Dr. Raub up at the Bluefield Sanitarium, didn't you?

A. Yes, sir.

Q. 707. And you told Dr. Raub that you got knocked off this car, completely off of the car, didn't you?

A. Yes, sir.

Q. 708. And furthermore, you told him you never had had any difficulty with your back before the accident, didn't you?

A. I still believe I had rheumatism, what hurt me when I was in the Army. I still believe that is what it was.

[fol. 961] Q. 709. That doesn't answer my question.

A. What is the question?

Q. 710. You also told Dr. Raub you never had had any back trouble of any kind before this accident of January 23rd, 1958, didn't you?

A. I may have.

Q. 711. Don't you know you did tell him that?

A. I may have.

Q. 712. If you did tell him that, why would you tell him a thing like that?

A. I don't remember. I may have said that.

Q. 713. You were trying to conceal from all of these doctors that examined you, Carl, weren't you——

A. No, sir, I wasn't.

Q. 714. (Continuing) —that you had had this back trouble?

A. This trouble you all say I have, I never know anything—I have that trouble until I hear you repeat the name over and over, over here. Dr. Raub explained the operation to me and said he would have to drill holes through my backbone and put wires in it.

Q. 715. I am not asking that. I am asking if you didn't tell Dr. Raub two things: one, that you fell completely off that car; you said you did tell him that.

A. I was telling all these doctors the best I knew how to [fol. 962] tell them.

Q. 716. I am asking again if you told him you never had had any previous back trouble.

A. I might have. I don't remember.

Q. 717. My question is: If you did tell Dr. Raub that, why would you tell him an untruth like that?

A. I don't remember.

Q. 718. You don't know?

A. I don't remember.

Q. 719. Yes. Then, I believe Dr. Crutchfield examined you down at Charlottesville, didn't he?

A. Yes, sir.

Q. 720. And you told Dr. Crutchfield that you never had had any previous difficulty with your back before this accident of January 23rd, 1958, didn't you?

A. I might have.

Q. 721. You might have?

A. I don't remember.

Q. 722. If you did, why did you tell Dr. Crutchfield that?

A. I don't remember.

Q. 723. Well, that doesn't answer the question. I say, why did you tell him?

A. If I don't think, I don't think. That's all I know. I [fol. 963] don't remember.

Q. 724. It wasn't true, was it?

A. I don't remember.

Q. 725. You don't remember. Carl, you don't have a very good memory about anything, do you? Your recollection is awful bad, isn't it?

A. I don't remember too much.

Q. 726. You don't remember too much.

A. If you was hurting like I am, you wouldn't either.

Q. 727. You mean you are hurting so bad that you can't tell the truth?

A. I am hurting so bad I can't half think, and you are asking me the same thing over and over, and I am answering the best I know how. I can start at the first and tell you all the way through, but it's hard for me to answer questions, you know, like that.

Mr. Sanders, Sr., to the Court: Is this a good time to quit, Your Honor?

The Court: All right.

The Court to the Jury: Ladies and gentlemen, remember all the instructions you have received at the hands of the Court. Don't enter upon any discussions about any matter pertaining to the trial of this lawsuit. Remember all the other instructions.

[fol. 984] Be back into court tomorrow morning at nine-thirty o'clock.

Witness stands aside temporarily.

Thereupon, it being 4:30 o'clock p.m., court adjourned until tomorrow, Friday, the 9th day of October, 1959, at 9:30 o'clock a.m., at which time the trial of this case was resumed.

CARL STULL, the plaintiff herein, on the stand at the hour of adjournment, being recalled for further examination, testified as follows:

Cross-examination.

By Mr. Sanders, Sr. (Continuing):

Q. 728. Carl, you say on the morning that you were injured, after you got off from work and went home, that somebody called you from Mr. Lilly's office?

A. Yes, sir. Yes, sir.

Mr. Walter W. Burton: Your Honor, would you [fol. 985] mind turning the mike on, please?

Mr. Shaffer: It's on.

Mr. Walter G. Burton to the Witness: See if it's on, Carl.

The witness complied with the foregoing request.

By Mr. Sanders, Sr. (Continuing):

Q. 729. Is it working now?
A. Yes, sir.

Mr. Sanders, Sr., to the Reporter: Would you read my questions and the answer, please?

The Reporter: (Reading from the record) "Question: Carl, you say on the morning that you were injured, after you got off from work and went home, that somebody called you from Mr. Lilly's office? Answer: Yes, sir. Yes, sir."

By Mr. Sanders, Sr. (Continuing):

Q. 730. And then you went down to Mr. Lilly's office?
A. Yes, sir.
Q. 731. And did you talk to Mr. Lilly?
A. Yes, sir.
[fol. 966] Q. 732. And you told Mr. Lilly that you were badly hurt? What did you tell Mr. Lilly?
A. Mr. Lilly asked me, the first thing he said to me, he asked me didn't I see the cars coming before I was struck.
Q. 733. Yes.
A. And I told him, no, I didn't, that if I had saw them any kind of a way at all, I would have got off before I was struck. And he said, "I guess you would."
Q. 734. And did you tell him you were hurt?
A. Yes, sir.
Q. 735. Did you tell him you were hurt very badly?
A. I told him I didn't know. I felt sort of numb.
Q. 736. Did you tell him you were not able to work?
A. Did I tell him——
Q. 737. That you were not able to work.
A. I told him I didn't know, I was hurting pretty bad.
Q. 738. Well, you don't remember telling Mr. Lilly that you were hurt so bad you couldn't work?
A. Yes, sir, I do. I told him I didn't know right at the present time because I was hurting pretty bad.
Q. 739. You were hurting pretty bad?
A. Yes, sir.
Q. 740. And you told him you didn't know whether you [fol. 967] could work or not?
A. I didn't. I told him I didn't know, that I was hurting pretty bad.

Q. 741. Then, at that time did you feel like you were able to go back on the job and stay there, and even though you didn't do any work, did you feel like that?

A. The way I felt then, I didn't feel like I was even able to go back.

Q. 742. Did you tell Mr. Lilly that?

A. Yes, sir.

Q. 743. That you didn't even feel like going back?

A. Yes, sir.

Q. 744. And Mr. Lilly told you you would have to go on back anyway and stay there and during your entire shift, is that what you tell the jury?

A. No, sir, I haven't told them anything. Mr. Lilly told me to—that he had my accident report and he had some papers he wanted me to sign, it wouldn't take long, and that he wasn't going to send the report in, that I could let him know what I wanted to do between then and the time to go to work.

Q. 745. That's right. Told you you could let him know what you wanted to do?

A. Yes, sir, what I was going to do.

[fol. 968] Q. 746. Yes. Then, Carl, you could have marked off sick then if you wanted to, couldn't you?

A. No, sir.

Q. 747. Why not?

A. Mr. Lilly won't mark you off like that.

Q. 748. Don't you know that you usually go to the clerk and mark off sick whenever you want to mark off?

A. You can mark off sick, like if you want to get off to go to a ball game or what not like that, but if you have been hurt, Mr. Lilly tell you, "Don't mark off."

Q. 749. Then, in this case, then, Mr. Lilly wouldn't let you mark off?

A. No, sir.

Q. 750. And do you mean that Mr. Lilly kept you down there on the job from January 23rd until February 2nd and although you were not feeling like working?

A. Pardon?

Mr. Sanders, Sr., to the Reporter: Read the question.

The Reporter: (Reading from the record) "And do you mean that Mr. Lilly kept you down there on the job from

January 23rd until February 2nd and although you were not feeling like working?"

A. He keep all men like that when they are injured.

Mr. Sanders, Sr.: I move to strike out the answer. That is not responsive to the question.

[fol. 969] The Court: Yes, that is not responsive to the question, and I instruct you (to the jury) not to consider it.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

The Court to the Witness: Mr. Still, just answer the questions, please, sir.

By Mr. Sanders, Sr. (Continuing):

Q. 751. What I am asking you, Carl, is this: You say from the time you were injured on January 23rd you didn't feel able to even be down on the job, did you?

A. No, sir.

Q. 752. And you tell the jury Mr. Lilly made you go down there and made you stay on your shift?

A. Yes, sir.

Q. 753. On the job?

A. Yes, sir.

Q. 754. Each and every day?

A. Yes, sir.

Q. 755. Did you ask him to let you mark off?

A. Yes, sir.

Q. 756. And he refused to do that?

A. Yes, sir.

Q. 757. Now, did you talk to any of the other men down on the job about that? Did you talk to Mr. Beavers about [fol. 970] it? You know Mr. Beavers, don't you?

A. Yes, sir, I know Mr. Beavers.

Q. 758. Did you ever discuss your condition with Mr. Beavers?

A. Mr. Beavers told me one night I didn't stay the whole shift that Mr. Lilly intended for me to stay the whole shift because he was going to pay me for the whole shift. All I had to do was just come down there to the railroad and stay there.

Q. 759. Did you tell Mr. Beavers you were not able to work?

A. Yes, sir.

Q. 760. Did you see Mr. Nicewonder?

A. Yes, sir, I saw him one night.

Q. 761. Did you tell Mr. Nicewonder you were not able to work?

A. Mr. Nicewonder, evidently he knew it because he told one of the conductors while I was on night duty that Mr. Lilly's orders was for me just to stay in the shanty on the railroad.

Q. 762. But did you tell Mr. Nicewonder you were not able to work and you wanted off?

A. He didn't ask me to do any work.

Q. 763. I say, but did you tell him you were not able to do any work?

A. I don't recall.

[fol. 971] Q. 764. You saw Mr. Nicewonder down there on the job every day, didn't you?

A. Yes, sir; but Mr. Lilly is Mr. Nicewonder's boss.

Q. 765. What is Mr. Nicewonder's job?

A. He's the general yardmaster. He's next to Mr. Lilly.

Q. 766. So, you didn't tell Mr. Nicewonder that you were not able to work, did you?

A. I don't recall telling him that.

Q. 767. Did you tell Mr. Webb that you were not able to work? Do you know Mr. Webb?

A. They didn't ask me was I able to work because I wasn't working.

Q. 768. My question is, Carl, did you tell Mr. Webb?

A. I don't recall.

Q. 769. Who is Mr. Webb?

A. The yardmaster for the West Yard.

Q. 770. And did you tell him? You saw him every day, didn't you?

A. I didn't see him every day that I went back because he was up in the office and I was down to the shanty.

Q. 771. You knew where his office was, didn't you?

A. Yes, sir.

Q. 772. And you never did go to Mr. Webb and tell him you were not able to work and you wanted to mark off, did [fol. 972] you?

A. Mr. Lilly is the boss of Bluefield Yard.

Mr. Sanders, Sr.: Your Honor, I move to instruct the witness to——

The Court to the Witness: Yes, Mr. Still, just answer the questions.

The Court to the Jury: And I instruct you not to consider the statement, "Mr. Lilly is the boss of the N. and W. yard." It wasn't responsive to the question.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 773. Did you ever tell Mr. Webb that you were unable to work and you wanted to mark off?

A. I have told Mr. Webb how bad I feel, but I don't know whether I told him I wanted to mark off or not.

Q. 774. But you have told him how bad you feel?

A. Yes, sir.

Q. 775. I believe Mr. Webb filled out your C.T. 37 report the night the accident occurred, didn't he?

A. He filled out an accident report; I don't know what the name of it is.

Q. 776. That was the night the accident occurred, wasn't it?

[fol. 973] A. Yes, sir.

Q. 777. And you saw him down in the shanty and he filled out the accident report?

A. I don't recall if we was in the shanty or his office, but we filled it out that night, because I remember when I got hurt who was on, and I told him I didn't remember any of them fellows' names, which I know all of them.

Q. 778. I believe you told the jury yesterday, Carl, that during the entire time you worked for the N. and W. from 1951 until 1958, that you never lost any time from work on account of sickness or disability, is that right?

A. That's right.

Q. 779. Carl, you may have stated this before, but would you tell us briefly again, just where do you hurt now? What is giving you trouble now?

A. Through my back and down my left leg.

Q. 780. Through your back and down your left leg?

A. Yes, sir.

Q. 781. Does your left leg hurt?

A. My left leg gets numb down to my knee, and I have pain on the outer side of my leg down to my ankle.

Q. 782. Your trouble now is through your back and down your left leg, is that right?

A. Yes, sir.

Q. 783. Your left leg, is it weak and painful to walk on? [fol. 974] A. If I stay in one position too long on it, my left leg will go numb.

Q. 784. Does your left leg pain you?

A. Yes, sir, it's numb.

Q. 785. Yes. I believe when—you do use a cane, don't you, Carl?

A. Yes, sir.

Q. 786. And when you walk with a cane, you usually carry it in your right hand, don't you?

A. Yes, sir.

Q. 787. Even though your left leg is the leg that pains you and the one that is numb?

A. I carry it the best I can, what make me feel the best. You know, when you are hurting, you will carry it the way it makes you feel the best.

Q. 788. Now, Carl, you said yesterday, I believe, that following the accident that you didn't know just how it occurred, and the way you found out is what the fellows told you down there about it, is that right?

A. Yes, sir.

Q. 789. How long was it before that you remembered yourself how the accident happened?

A. I had an idea how it happened, and from conversation with the fellows. After I had got Mr. Burton to look into it for me, up until that time I didn't know exactly how it happened. The last I remember was hitting [fol. 975] against the side of the car.

Q. 790. You didn't employ Mr. Burton for several months after the accident, did you?

A. No, sir.

Q. 791. And you didn't know exactly how it happened until you talked to Mr. Burton?

A. Well, I had talked to many of the fellows—no more than what they would say—when I was on night duty.

Q. 792. Now, you remember very clearly how it happened, do you?

A. Just like I did before.

Q. 793. Very clearly?

A. Just about as clear as I did, you know, before.

Q. 794. How tall are you, Carl.

A. I don't know, sir.

Q. 795. Well, don't you have any idea? About five nine?

A. I don't know.

Q. 796. You have no idea how tall you are?

A. No, sir.

Q. 797. How much do you weigh?

A. I don't know, sir.

Q. 798. You say you haven't been able to do anything, Carl, since you were injured on January 23rd, 1958?

A. No, sir, I haven't.

Q. 799. Do you drive a truck?

[fol. 976] A. Sir?

Q. 800. Do you drive a truck?

A. I have a truck.

Q. 801. What kind of a truck is that?

A. A '53, half-a-ton, pick-up truck.

Q. 802. You are able to drive that truck, aren't you?

A. I can drive up and down the hill where I live better than I can walk up and down the hill where I live.

Q. 803. You have a car, too, don't you?

A. Yes, sir.

Q. 804. And you drive your truck nearly every day, don't you, Carl, and you have been for a year or so?

A. Not every day. If I can't get anyone to come and get me and take me down the street to where I can get something to eat, I have to take it down myself.

Q. 805. Why do you drive the truck in preference to the car?

A. My car is out of order. I don't have tires, muffler, and windshield wipers on it.

Q. 806. Have you been—you haven't been active at all during the last year or so, have you, Carl? I say, you haven't been active—able to get around and do any physical work of that kind?

A. No, sir.

Q. 807. Carl, did you have—about two months ago did you have a fight with another man down in your mother's

[fols. 977-978] restaurant down on South Bland Street over at Bluefield?

A. No, sir.

Q. 808. You didn't?

A. No, sir.

Q. 809. You have testified that you were in the Army; you were at Camp Beale, California, in the Army hospital for twenty-one days. You were examined by the Army doctors, and later you were examined by the Veterans Administration doctors, weren't you, when you applied for a pension?

A. Would you repeat the question, please, sir?

Mr. Sanders, Sr., to the Reporter: Read the question.

The Reporter: (Reading from the record) "You have testified that you were in the Army; you were at Camp Beale, California, in the Army hospital for twenty-one days. You were examined by the Army doctors, and later you were examined by the Veterans Administration doctors, weren't you, when you applied for a pension?"

A. That last end of it, I didn't understand it.

Q. 810. You were examined at Camp Beale by the Army doctors, weren't you?

A. Yes, sir.

Q. 811. And later when you applied for a pension, you were examined by the Veterans Administration doctors, [fol. 979] weren't you, Carl?

A. No, sir.

Q. 812. You were not examined by the Veterans Administration doctors?

A. Not as I know of.

Q. 813. Didn't you go to either Huntington, Philadelphia, or some place for an examination by the Veterans Administration doctors?

A. Not as I remember.

Q. 814. You don't remember that. Are you willing for your Army records and your Veterans Administration records to be produced in court here so that the jury can have the benefit of them?

A. It's all right with me.

Q. 815. You are entirely willing for that, are you?

A. Yes, sir.

Q. 816. Now——

Mr. Walter G. Burton: Your Honor—just wait a minute. At the proper time—this man doesn't know his rights and doesn't know the law. Evidently his lawyers don't either. But we will have some objections to some part of the records; nothing that he signed and nothing he filled out, but there is some law about the other parts.

The Court: All right.

[fol. 980] By Mr. Sanders, Sr. (Continuing):

Q. 817. One other question, Carl. I believe when young Mr. Burton was examining you yesterday, and just before I began cross-examining you, he asked you this question—now, you listen: "Now, prior to the time you were injured, had your back ever given you any pain or discomfort? Answer: No, sir." Do you remember giving him that answer?

A. Yes, sir.

Q. 818. Well, that wasn't true, was it?

A. That answer, you mean?

Q. 819. The answer that you gave your own attorney yesterday.

A. Yes, sir.

Q. 820. When you said that your back had never given you any pain or discomfort, that wasn't a true answer, was it?

A. Yes, sir, it was true.

Q. 821. Well, how can it be true, Carl, if you now admit that you began having trouble with your back while you were in the Army and you got a medical discharge? You have already admitted here many times that you did have trouble with your back before you began working for the Norfolk and Western, haven't you?

A. I told you I had rheumatic fever and I hurt all over.

Q. 822. Including your back?

[fol. 981] A. All over. That's me. All over; everything hurting you.

Q. 823. Well, I will ask you again. This answer that you gave to Mr. Burton, I am going to read it again, the question and answer. Here is the question: "Now, prior to the time you were injured, had your back ever given you any pain or discomfort? Answer: No, sir." Now, you

did answer that yesterday, didn't you? That was your answer?

A. I don't know what kind of answer—I don't know what you want me to say, how to answer you. You asked the question and answered it, too. If you ask me the question, I am going to try to answer it the best I can. Don't answer it, and I'll answer it.

Q. 824. Didn't young Mr. Burton ask you this question yesterday just before your examination in chief was ended —this is the question: "Now, prior to the time you were injured, had your back ever given you any pain or discomfort?" And didn't you answer, "No, sir"?

A. Yes, sir, I answered, "No, sir."

Q. 825. Yes. Was that a true answer?

A. Yes, sir.

Mr. Sanders, Sr.: That was true? That's all.

Mr. Walter W. Burton: If the Court please, just a minute.

At this point, Mr. Walter W. Burton conferred briefly with Mr. Walter G. Burton.

[fol. 982] Mr. Walter G. Burton to Counsel for the Defendant: Mr. Sanders, will you and the gentlemen approach the bench a minute?

Counsel for the plaintiff and counsel for the defendant thereupon approached the bench and spoke with the Court.

The Court to the Jury: Let's take a short recess, and you ladies and gentlemen of the jury remember all the instructions of the Court. I'll call you back in a little while.

Thereupon, it being 9:58 o'clock a.m., a recess was taken until 10:09 o'clock a.m., during which the witness did not leave the stand, and after which time the trial of this case was resumed.

Re-direct examination.

By Mr. Walter W. Burton:

Q. 1. Carl, in October, 1956, were you discharged from the Norfolk and Western Railroad Company?

A. Yes, sir.

Q. 2. In November of 1957 did you go back to work for the Norfolk and Western Railroad Company?

A. Yes, sir.

Q. 3. There has been introduced in evidence here, Carl, an application that you made at the time you went to [fol. 983] work in 1951. I want you to take your time, now —it's Exhibit No. — Defendant's Exhibit No. 4. Take your time, now, and look at all the writing on that paper and state whether or not you filled out that complete form in your own handwriting.

Mr. Sanders, Sr.: He stated on yesterday that it was.

The Witness: I said, "I think" yesterday. I remember that.

The witness thereupon examined Defendant's Exhibit No. 4.

A. I still think like I did yesterday, but I am not sure —I didn't notice these signatures here—I didn't put that on there.

Q. 4. What are you pointing to there, Carl?

A. I didn't read it. I know I didn't put that on there.

Q. 5. These names that are on there in number nineteen, the reference column?

A. Yes, sir.

Q. 6. You say you know that is not your handwriting?

A. I didn't put this. I know this is my name. I know I wrote that. This don't look like mine. It could be.

Q. 7. What are you pointing to when you say, "This doesn't look like mine," please, sir?

[fol. 984] A. Honorable discharged.

Q. 8. Is that the answer to question number eleven on that form?

A. Yes, sir.

Mr. Sanders, Sr.: Your Honor, we object to this. This witness is flatly contradicting his testimony on yesterday.

The Witness: Yesterday I said I didn't know for sure.

Mr. Walter G. Burton to the Witness: Just wait, Carl, and let the Court rule.

The Witness: I thought he was talking to me.

Mr. Walter G. Burton: No.

The Court: I'll sustain the objection to this.

Mr. Sanders, Sr.: Sir?

The Court: I'll sustain the objection to this.

To which action and ruling of the Court, the plaintiff, by counsel, at the time excepted.

Mr. Walter G. Burton: Wait. May we vouch the record?

OUT OF THE HEARING OF THE JURY

Mr. Walter G. Burton: Counsel for the plaintiff here vouches the record and says that if the witness were [fol. 985] permitted to answer, that in the Exhibit No. 4 for the defendant, that he would say that under question nineteen he did not write Dr. Higginbotham's name, he did not write Fisher Hooser's name, and he did not write Greate Alexander's name, and that he did not, under eleven, write "honorable discharged."

WITHIN THE HEARING OF THE JURY

By Mr. Walter W. Burton (Continuing):

Q. 9. Now, Carl, referring to Defendant's Exhibit No. 5 which is "Norfolk and Western Railway Company, Physical Examination for Employment Only," that you testified has your signature attached to it, did you do any of the other writing on that card?

A. I can't read this writing.

Q. 10. Did you write—did you fill out that card, Carl?

A. No, sir.

Q. 11. Do you know when it was filled out?

A. I can see.

Q. 12. No, not from what the card says. From what you know yourself, do you know when it was filled out? [fol. 986] A. Do I know when this was filled out?

Q. 13. (Mr. Walter W. Burton nodded his head affirmatively.)

A. See if I understand you.

Q. 14. The question is, Carl, do you know of your own knowledge when that card was filled out?

A. No, sir.

Q. 15. All right. Now, referring to Defendant's Exhibit No. 8, which is also a "Norfolk and Western Railway Company, Physical Examination for Employment Only," that you testified has your signature on it, did you fill out that card?

The witness thereupon examined the exhibit in question.

A. No, sir.

Q. 16. Do you of your own knowledge know when that card was filled out—of your own knowledge, now?

A. No, sir.

Q. 17. Referring now to Defendant's Exhibit No. 7, which is another "Norfolk and Western Railway Company, Physical Examination for Employment Only," did you fill out anything on that card besides your signature, which you have already said is your signature?

The witness thereupon examined the exhibit in question.

A. No, sir.

[fol. 987] Q. 18. Do you know of your own knowledge when that card was filled out?

A. No, sir.

Q. 19. Now, Carl a minute ago Mr. Sanders asked you when you remember about the accident. Do you recall him asking you the questions that he did about that?

A. I don't recall.

Q. 20. Well, do you remember Mr. Sanders asking you when you remembered how this accident happened?

A. Would you repeat that for me?

Mr. Walter W. Burton to the Reporter: Could you read it to him, please, Mrs. Honts?

The Reporter: (Reading from the record) "Well, do you remember Mr. Sanders asking you when you remembered how this accident happened?"

A. I don't know if he asked me or not. He asked me questions——

Q. 21. Carl, do you know, now—not from what you understand, but from what you know—how this accident happened up until the time you got knocked against the car?

A. Mr. Burton, I can tell you how we get on the cars and how we roll out, and so forth, like that, but I don't understand what you want me to tell you now.

Q. 22. Carl, that's not my question. On the night you were hurt——

[fol. 988] A. Yes, sir.

Q. 23. (Continuing) —do you remember just when you were hurt?

A. I remember hitting against the side of the car.

Q. 24. You remember yourself hitting against the side of the car?

A. Yes, sir.

Q. 25. Now, do you remember anything after that?

A. (The witness made no reply to the foregoing question.)

Q. 26. What is the first thing that you remember after that?

A. They was crowding around there by the motor car. I just remember a little of it—not—I was hurting and——

Q. 27. All right; now, prior to the time that you remember hitting the car, do you remember what happened from the time that you first got on that car?

A. Yes, sir, I can tell you how it happened.

Q. 28. Now, you can remember that yourself?

A. Down to where I got hit.

Mr. Walter W. Burton: O.k. You (to counsel for the defendant) may inquire.

Re-cross-examination.

By Mr. Sanders, Sr.:

[fol. 989] Q. 1. Carl, were you knocked unconscious at the time of the accident?

A. I don't know. I don't think.

Q. 2. You weren't struck in the head, were you?

A. No, sir, I wasn't struck in the head, as far as I know.

Q. 3. As far as you know, you didn't get a head injury?

A. No, sir.

Mr. Sanders, Sr.: That's all.

The Court to the Witness: That's all.

At this point, the witness left the witness stand and walked toward his chair at the counsel table.

Mr. Sanders, Sr.: Can I ask him one other question, Your Honor, from right where he stands?

The Court: All right.

Mr. Sanders, Sr., to Dr. Karl Weier: Dr. Weier, would you come over, please?

Dr. Karl Weier thereupon left his seat in the court room and walked to the counsel table to a point where he was in the view of the witness.

By Mr. Sanders, Sr. (Continuing):

Q. 4. Carl, this is Dr. Weier, at the Bluefield Sani-
[fol. 990-998] tarium Clinic. Do you remember going to him in 1947 complaining of low back disability and he examined you for the Veterans Administration?

A. No, sir.

Q. 5. You don't have any recollection of that?

A. No.

Mr. Sanders, Sr.: All right.

Dr. Karl Weier thereupon returned to his seat in the court room.

Witness stands aside.

. . . . . .

[fols. 999-1000] And, Thereupon, the defendant, to maintain the issue on its behalf, introduced the following evidence, to-wit:

Dr. Karl Weier, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders Sr.:

Q. 1. What is your name?

A. Dr. Karl Weier.

Q. 2. Where do you live, Dr. Weier?

A. In Bluefield, West Virginia.

[fol. 1001] Q. 3. Are you connected with the Bluefield Sanitarium Clinic?

A. Yes, sir.

Q. 4. What do you specialize in, Dr. Weier?

A. Internal medicine.

. . . . . .

[fol. 1002] Q. 11. Yes. Dr. Weier, do you have in your hands there the—a file of Carl Still?

A. Yes, sir, I do.

Q. 12. Being a record of the Bluefield Sanitarium?

A. That is correct.

Q. 13. I will ask you if in the year of 1947 you examined Carl Still for the Veterans Administration.

A. Yes. The record indicates that I examined one Carl Still, who lived at 229 Vine Street, Bluefield, West Virginia, on about 11-4-47.

. . . . . .

[fol. 1003] Q. 17. And up in the upper right-hand corner—up in the upper right-hand corner of the record you have, it says, "C-No. 6871356." Do you know what that is?

A. Yes, sir, I do.

Q. 18. What is that? What does that represent?

A. Well, it's a number, as I understand it, that's given to a veteran of military service at the time he makes claim for some benefits that a veteran may be eligible to.

Q. 19. I see. Doctor, you have there the record that you [fol. 1004] made of the examination at the time, do you?

A. Yes, sir.

Q. 20. What does that record indicate?

Mr. Walter G. Burton: Indicate? That's not proper. We want to know what it shows.

By Mr. Sanders, Sr. (Continuing):

Q. 21. What does it show?

The Court: What it shows.

A. Well, it shows that at the end of the examination I made the following notes: that Carl Still, or the person examined, had complained of low back disability, of his heart fluttering, and that sodium salicylate, which is a drug that is normally used for backache and pain, was advised.

. . . . . .

[fols. 1005-1009] Q. 25. Do you know how he happened to come to you for this examination?

A. Yes. This examination was done in order that he might be placed on the waiting list or—in making application for admission to a veteran's hospital.

Q. 26. Yes. I believe it says on the record there, "Physi-

cal examination to determine the need for hospitalization"?

A. That's right.

. . . . . .

[fols. 1009-1015] SAM A. TIANO, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

. . . . . .

[fol. 1016] IN THE COURT ROOM

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. Sam A. Tiano.

Q. 2. Where do you live, Mr. Tiano?

A. 102 Sheller Street, Beckley, West Virginia.

Q. 3. What is your business or occupation?

A. I'm an Attorney Field Examiner with the Veterans Administration.

Q. 4. You went to law school, did you?

A. Yes, sir.

Q. 5. You are a law graduate?

A. Yes, sir.

Q. 6. Where did you go to school?

A. Beg your pardon?

Q. 7. Where did you get your law degree?

A. West Virginia University.

Q. 8. And how long have you been employed as an At-[fol. 1017] torney Field Examiner for the Veterans Bureau —Veterans Administration?

A. Just over three years.

Q. 9. You live in Beckley, West Virginia?

A. Yes, sir.

Q. 10. Where is the Regional Office of the Veterans Administration——

A. Huntington.

Q. 11. (Continuing) —closest to you?

A. Huntington, West Virginia.

Q. 12. And what is the Regional Office down there? What—do they keep any records down there pertaining to veterans at the Regional Office, Mr. Tiano?

A. Yes, sir.

Q. 13. What records do they keep down there?

A. Well, they keep the veterans' "C" files, one of which I have in my hand, and they also keep records of children of veterans where we have guardianships established for the children. They keep files on the children.

Q. 14. Yes. Now, what is the file that you have in your hand? What does it purport to be?

A. The "C" file, or claim file, of Carl Still, veteran.

Q. 15. And where does this Carl Still live, according to the records which you have?

A. Well, there's one or two addresses in here—I mean, [fol. 1018] that he gave.

Q. 16. What city?

A. Bluefield, West Virginia.

Q. 17. Is one on Vine Street in Bluefield, West Virginia, and the other Yadkin Street in Bluefield, West Virginia?

A. Yes, sir.

Q. 18. There are two addresses there?

A. Yes, sir.

Q. 19. Which apply at different times?

A. At different times throughout the file.

Q. 20. Yes. Does this file—what does this file purport to contain, Mr. Tiano? Elaborate on it a little more. What does it purport to contain?

A. Well, this file contains all medical records of Carl Still made by Army doctors and VA doctors while he was in the United States Army. It also contains his medical discharge from the Army. It contains an application for a pension that he made with the United States Government, and also correspondence that pertained to this case.

Q. 21. Does it also purport to show examinations made by the doctors of the Veterans Administration subsequent to his discharge from the Service?

A. Yes, sir.

Q. 22. Yes. Of course, you have no personal knowledge of Carl Still or of this file, do you?

[fol. 1019] A. No, sir.

Q. 23. I take it the file was sent to you, was it?

A. Yes, sir.

Q. 24. And who did you receive this file from?

A. My boss, the Chief Attorney of the Veterans Administration.

Q. 25. What's his name?

A. Emmett L. Moseley.

Q. 26. And what is his title?

A. Chief Attorney.

Q. 27. Chief Attorney for the Regional Office of the Veterans Administration at Huntington, West Virginia?

A. Yes, sir.

Q. 28. Did Mr. Moseley place that file in your hands and direct you to produce it here in this court on the trial of this case?

A. Yes, sir.

Q. 29. What is this paper I hand you here? Did that accompany the file?

A. Yes, sir. This is a Notice of Transfer of Veteran's Records. This was sent to Mr. Merrill W. Fox, who is the Chief of the Administrative Division at Huntington Regional Office. Mr. Fox has the care and custody of these records. This was sent by the Chief Attorney to Mr. Fox authorizing Mr. Fox to send this record to me at my address at Beckley, West Virginia.

[fols. 1020-1022] Q. 30. So that you could produce it here as a representative of Mr. Fox——

A. That's right, and Mr. Moseley.

Q. 31. (Continuing) —who is the custodian of these records?

A. Yes, sir.

. . . . . .

[fol. 1023] By Mr. Sanders, Sr. (Continuing):

Q. 32. Mr. Tiano, are there federal regulations pertaining to the production of these records?

[fol. 1024] A. Yes, sir, there are.

Q. 33. Under the federal regulations pertaining to the production of these documents, is Mr. E. L. Moseley, Chief Attorney, Regional Office, Huntington, West Virginia, the person who makes the decision as to whether those records will be produced in court?

A. Yes, sir.

Mr. Walter G. Burton: We object to what his decisions are.

Mr. Sanders, Sr.: I have those federal regulations, Your Honor.

The Court: All right.

Mr. Sanders, Sr.: They are public records which I will be glad to make available to the Court or counsel.

The Court: Objection overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 34. Now, Mr. Tiano, you may want to get into your records. You may have to place them on the table over here. You might have to get some of them out. So, you might——

Mr. Sanders, Sr., to the Court: Can he sit over here, [fol. 1025] Your Honor, so—he will have to go through the file. It may be handier here.

The Court: That will be satisfactory if he will talk out so Mrs. Honts (referring to the reporter) can hear him.

The Witness: Yes, sir.

The witness thereupon left the witness stand and sat at the end of counsel table, arranging his papers on the table before him.

By Mr. Sanders, Sr. (Continuing):

Q. 35. Do you have in your file a paper entitled, "Certificate of Disability for Discharge," showing—Certificate of Disability for Discharge of Carl Still, signed by Paul V. Anderson, Personnel Officer, and on an official form? Do you have that?

A. I have it, if I can find it.

Q. 36. All right. Take your time.

The witness thereupon looked through his papers.

A. I have found it.

Q. 37. I believe I have a photocopy of that here in my hand?

A. Yes, sir, you do.

Q. 38. I believe this copy is fairly legible, too, I have here?

A. Yes, sir.

[fol. 1026] Mr. Sanders, Sr.: We offer this copy in evidence, Your Honor.

Mr. Sanders, Sr., thereupon showed the paper in question to the Court.

The Court: It may be introduced. What is that entitled?

Mr. Sanders, Sr.: Certificate of Disability for Discharge.

The photocopy of the paper entitled, "Certificate of Disability for Discharge," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 12. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 39. Do you have in the file the discharge—actual discharge given to Carl Still?

A. Yes, sir.

[fol. 1027] Q. 40. Will you locate that, please, sir?

The witness thereupon looked through his papers.

Q. 41. I believe what you have there is designated, "Separation Qualification Record." The discharge. That's the certificate, but do you have the Honorable Discharge in there, or is that given to the veteran?

A. Oh, no, that is given to the veteran. This is a copy.

Q. 42. You have a copy of the Honorable Discharge in here. All right. Do you have in the file an application made by Carl Still and signed by him, applying for a pension or compensation?

A. Yes, sir.

Q. 43. May I see that?

The witness thereupon handed a paper to Mr. Sanders, Sr.

Q. 44. Will you have a seat over there now? I am going to ask you some questions about that.

The witness thereupon returned to the witness stand and sat in the witness chair.

Q. 45. This paper—it's on an official form entitled, "Veteran's Application for Pension or Compensation for Disability Resulting from Active Military or Naval Service," is that correct? At the top.

A. Yes, sir.

[fol. 1028] Q. 46. Is this paper signed by Carl Still?

A. Yes, sir.

Q. 47. What address is given on this paper?

A. 229 Vine Street, Bluefield, West Virginia.

Q. 48. Now, under three here, "Nature of disease or injury on account of which claim is made and date each began," will you read to the jury as best you can what it says there? It's a little difficult to read. Will you see if you can read that into the record? Look it over carefully before you attempt to read it.

The witness thereupon examined the portion of the paper indicated by Mr. Sanders, Sr.

A. (Reading) "Heart flutters——

The Court: Wait just a minute. Let me turn this on.

The Court thereupon turned on the microphone in front of the witness chair.

A. (Continuing) "Heart flutters, rheumatism in my back and where my bones joins together. (1st part of 1942.) Pains in my right side, come from where I have had my ribs broken. Has got bad since I have been in the Army." I had better put something in there— "(Last of 1941)"

Q. 49. Mr. Tiano, do I have in my hand here a photocopy—a machine copy—of that application which you just read from?

[fol. 1029] A. Yes, sir; it's a VA Form 526.

Q. 50. Were you present when I made it?

A. Yes, sir.

Mr. Sanders, Sr.: We offer, Your Honor, in evidence this machine copy of the application about which the witness has just testified.

The Court: It may be introduced.

The machine copy of the application entitled, "Veterans' Application for Pension or Compensation for

Disability Resulting from Active Military or Naval Service," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 13. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 51. Now, Mr. Tiano, would you come around here? I am going to ask you about some of those others. I believe you can handle it better on the table here.

[fol. 1030] The Court to Mr. Sanders, Sr.: You might tell Mr. Tiano several of these records you want, and while he is locating them, we will let the jury take a recess here.

The Court to the Jury: Ladies and gentlemen of the jury, remember all the instructions. Let's take a short recess. I'll call you back in about fifteen or twenty minutes.

Witness stands aside temporarily.

Thereupon, it being 11:10 o'clock a.m., a recess was taken until 11:29 o'clock a.m., at which time the trial of this case was resumed.

Sam A. Tiano, the witness on the stand at the time of recess, being recalled for further examination, testified as follows:

The witness sat at the end of counsel table with his papers arranged on the table in front of him.

[fol. 1031] Direct examination.

By Mr. Sanders, Sr. (Continuing):

Q. 52. Mr. Tiano, when a veteran makes a claim for a pension or compensation to the Veterans Administration, is he given what is known as a claim number?

A. Yes, sir.

Q. 53. Does that follow his file from beginning to end?

A. Yes, sir, it follows the file, and all correspondence to the VA, you have to have the "C" number—the claim number.

Q. 54. What is the claim number as shown throughout this file?

A. C-6871356.

Q. 55. Now, from your examination of this file, does that claim number run throughout the file?

A. Yes, sir.

Q. 56. The claim number 6871356?

A. Yes, sir.

Q. 57. I believe when a man is taken into the Army, he is also given a serial number?

A. Yes, sir.

Q. 58. And does the serial number—is it the same throughout this file, so far as you have observed?

[fol. 1032] A. His serial number stays with him from when he goes into the Army until he dies; it stays with him all the way.

Q. 59. What is the serial number as shown on Carl Still's records?

A. 35997093.

Q. 60. Give me that again.

A. 35997093.

Q. 61. Yes. Now, in this Certificate of Disability for Discharge, Defendant's Exhibit No. 12, does that same serial number appear on that?

A. Yes, sir.

Q. 62. And in the Veteran's Application for Pension or Compensation, Defendant's Exhibit No. 13, does that same serial number appear?

A. Yes, sir.

Q. 63. Now, do you have in the file a paper designated, "Application for Hospital Treatment or Domiciliary Care," dated December 11th, 1950, and signed by Carl Still?

A. Yes, sir.

Q. 64. Do I have a copy of that in my hand, which was made in your presence?

A. Yes, sir.

Q. 65. I believe there's—it has typed and writing on the [fol. 1033] front and the back?

A. Yes, sir.

Mr. Sanders, Sr.: We offer this machine copy of that application in evidence.

The Court: Let it be introduced.

The machine copy of the application entitled, "Application for Hospital Treatment or Domiciliary Care," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 14. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 66. Does that same claim number, C-6871356, appear on that application?

A. Yes, sir.

Q. 67. Do you have a letter in your file dated December 15th, 1950, on the letterhead of the Veterans Administration, addressed to Mr. Carl Still, some number on Yadkin Street, Bluefield, West
[fol. 1034] Virginia?

A. Yes, sir.

Q. 68. Signed by C. R. Whitehead,——

A. Yes, sir.

Q. 69. (Continuing) —Registrar? Did that letter advise Carl Still that his application for hospital treatment had been declined?

A. Yes, it did.

Q. 70. Is this a copy of that letter I have in my hand?

A. Yes, sir.

Mr. Sanders, Sr.: We offer this in evidence, Your Honor.

The Court: It may be introduced.

The machine copy of the letter above described, identified by the witness, was thereupon offered in evidence

by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 15. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

[fol. 1035] By Mr. Sanders, Sr. (Continuing):

Q. 71. Do you have in your file there a paper designated, "Award of Disability Pension," dated March 21st, 1946, which awards a pension to Carl Still?

The witness thereupon looked in his file.

A. I have found it.

Q. 72. You have that, do you?

A. Yes.

Q. 73. Is this a photocopy, a true copy, of that Award of Disability Pension?

A. Yes.

Q. 74. Does that show the condition for which that award was made?

A. Yes, sir.

Q. 75. What condition?

A. Spondylolisthesis.

Mr. Sanders, Sr.: Yes. We offer this copy in evidence.

The Court: Let it be introduced.

Q. 76. That was dated February 28th, 1946, was it?

A. Yes, sir.

[fol. 1036] The photocopy of the paper entitled, "Award of Disability Pension," identified by the witness, was thereon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 16. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 77. Do you have in your file a paper designated, "Rating Sheet,"——

A. Yes, sir.

Q. 78. (Continuing) —in which a pension theretofore allowed to Carl Still was discontinued?

A. Yes, sir.

Q. 79. Is this a copy of that Rating Sheet that I hold here?

A. Yes.

Mr. Sanders, Sr.: We offer this in evidence.

The Court: What's the date of that?

The Witness: It's up at the top.

Mr. Sanders, Sr.: Date of rating, July 20th, 1948.

[fol. 1037] The photocopy of the paper entitled, "Rating Sheet," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 17. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 80. Do you have there before you what purports to be records of the Army hospital showing an examination of Carl Still, designated, "Abbreviated Clinical Record"?

A. Yes, sir.

Q. 81. How many pages does that include, including the X-ray report? Would you count them?

A. Counting front and back, nine.

Q. 82. Nine pages. Are these copies of these pages which I have before me?

A. Yes, sir.

Q. 83. Were those made in your presence?

A. Yes, sir.

[fol. 1038] Mr. Sanders, Sr.: These pages are attached together, Your Honor. We offer them.

The Court: Let them be introduced.

The pages attached together, being nine in number, the top page of which was entitled, "Abbreviated Clinical Record," identified by the witness, were thereupon offered in evidence by the defendant, and the same were introduced, filed, marked:

"Defendant's Exhibit No. 18. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 84. Do you have in these records what purports to be a "Report of Physical Examination," made by the doctors of the Veterans Administration?

A. Yes.

Q. 85. How many pages does that report consist of?

A. Ten pages.

Q. 86. Well—how many pages there appear down to the "Diagnoses," thirty-one?

[fol. 1039] Upon request, the reporter read the foregoing question, as reported.

A. Seven.

Q. 87. How many did you say?

A. Seven.

Q. 88. Are these copies of that "Report of Physical Examination" that you referred to?

A. Yes.

The Court: What's the date of that?

Mr. Sanders, Sr.: The date of that is—I was just trying to find it, Your Honor.

The Witness: It's right down here (indicating), March 29th, 1948.

Mr. Sanders, Sr.: Oh, yes, that's the date he was examined, March 28th, 1948.

The Witness: Twenty-ninth.

Mr. Sanders, Sr.: March 29th, 1948, at Huntington, West Virginia. We offer this copy of "Report of Physical Examination" in evidence.

The Court: It may be introduced.

The photocopy of the "Report of Physical Examination," being seven pages attached together, identified by the witness, was thereupon offered in evidence by [fol. 1040] the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 19. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 89. Attached to that report, did you find a paper prepared on the typewriter and signed, reciting the history, examination, and diagnosis?

A. Yes.

Q. 90. Are these true copies of the paper which you have here?

A. Yes, they are.

Q. 91. I believe the paper that you have is typed on the front and on the back?

A. Yes.

Q. 92. And the paper that I have here is a copy of that showing the front and the back of it?

A. Yes, it is.

Mr. Sanders, Sr.: We offer this in evidence.

[fol. 1041] The Court: What is that denominated?

No reply was made to the foregoing question by the Court.

The Court: What do you call that paper?

Mr. Sanders, Sr.: It has at the top, "Clinical Record—Orthopedic—Consultation Sheet."

The Court: All right; let it be introduced.

The photocopy of the paper above described, identified by the witness, was thereupon offered in evidence by

the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 20. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 93. Do you have a record in the file pertaining to Carl Still with some type on it and then the following writing in pen and ink: "Spondylolisthesis, second-degree, severe, secondary to congenital defects of lumbo-sacral junction. E.P.T.S."?

A. Yes, I have.

Q. 94. Is this a true copy of that sheet of paper that I have here?

[fol. 1042] A. Yes.

Q. 95. What is the date of that?

A. The tenth of January, 1946.

Q. 96. Does that bear the same serial number that you have testified about?

A. Yes.

Mr. Sanders, Sr.: We offer this in evidence.

The Court: It may be introduced.

The photocopy of the paper above described, identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 21. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 97. Do you have in the file a paper designated, "Consultation Request and Report," pertaining to Carl Still,

which is written in pen and ink, and signed by J. L. Wilkerson, Captain, M.C.?

A. Yes.

Q. 98. Is this a true copy of that paper that I have [fol. 1043] here?

A. Yes, it is.

Mr. Sanders, Sr.: We offer this paper in evidence.

The Court: What's the date of that paper?

Mr. Sanders, Sr.: January 24th, 1946.

The Court: It may be introduced.

The photocopy of the paper entitled, "Consultation Request and Report," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 22. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 99. Do you have a paper in the file entitled—marked at the top, "Medical Information and Recommendations for Vocational Rehabilitation"?

A. Yes, I do.

Q. 100. What's the date of that?

A. May 27, 1947.

[fol. 1044] Q. 101. Does that pertain to Carl Still and bear his veteran's claim number?

A. Yes, it does.

Mr. Sanders, Sr.: We offer this in evidence.

The Court: It may be introduced.

The photocopy of the paper marked at the top, "Medical Information and Recommendations for Vocational Rehabilitation," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 23. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 102. Now, Mr. Tiano, would you look in the little folder back there (referring to witness's file)? I want to ask you about some of those cards.

The witness thereupon complied with the foregoing request.

Q. 103. Just these cards that I wanted to ask you about. Could I look at those? Do you have in this file a card pertaining to Carl Still, which has written on the front of [fol. 1045] it in type, "Spondylolisthesis, second degree, severe, secondary to congenital defects of lumbo sacral junction. No reconditioning"; and on the back of it, "Certificate of Disability Discharge due to Dg. space 11; soldier incapacitated for all types of military service by reason of chronic pain in lower back"? Do you have that?

A. Yes, I do.

Q. 104. Is this signed by an Army doctor? It purports to be signed by an Army doctor?

A. Yes, it is.

Q. 105. Signed by R. C. Alexander, Second Lieutenant M.A.C.? What's "M.A.C."?

A. Medical Corps.

Q. 106. Is this a true and correct copy of that card which I have before me, the front and the back of it?

A. Yes.

Mr. Sanders, Sr.: We offer this in evidence.

The Court: What's the date of that, please, sir?

The Witness: January 10th, 1946.

Mr. Sanders, Sr.: January 10th, 1946.

Mr. Walter G. Burton: Your Honor, we want to call the gentlemen's attention to the fact that they say that is signed by a Second Lieutenant. There are no doctors in the Army that are Second Lieutenants. There can't be. There can't be.

The Court: It may be introduced.

[fol. 1046] Mr. Walter G. Burton: We object to it.

Which objection the Court overruled, to which action

and ruling of the Court the plaintiff, by counsel, at the time excepted.

The photocopy of the card above described, identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 24. 10-9-59. N.V.H."

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 107. Now, do you have in there an application for hospitalization made by Carl Still about 1947?

A. Yes, I do.

At this point, the witness returned to the witness stand and sat in the witness chair.

Q. 108. What is the date of this application by Carl Still for hospitalization?

A. November 4th, 1947.

Q. 109. Does that state the reasons that he is asking [fol. 1047] for hospitalization? I don't have a copy of this prepared. Would you read into the record what it states as to the reasons for requesting hospitalization?

A. Well, I'll just read the thing to you. "Symptoms: Complains of low back pain when the weather is bad and his heart flutters." In another section: "Physical Findings: Robust in"—something, but I can't make out the word. "Has prominent sacrum with hollow back; no muscle spasms; no limitation of movement. Diagnosis: Low back pain."

Q. 110. Mr. Tiano, that was an application, now, by Carl Still for hospitalization by the Veterans Bureau made in 1947?

A. Yes, sir.

Q. 111. According to the file which you have in your hand, was that application rejected?

A. Yes, it was.

Q. 112. Do you have a letter there rejecting it?

A. Yes, sir.

Q. 113. What's the date of that letter?

A. November 18th, 1947.

Q. 114. Would you read the letter into the record?

A. It's from: Regional Office, 824 Fifth Avenue, Huntington, West Virginia. It is then dated November 18th, 1947, and has the veteran's "C" number, C-6871356, and it's addressed to: Mr. Carl Still, 229 Vine Street, Bluefield, [fols. 1048-1051] West Virginia.

"Dear Mr. Still:

"Reference is made to your application for hospital treatment, Form 10-P-10, which was submitted to this office for consideration.

"You are advised a review of the medical certificate of your application does not indicate your condition to be one for which hospitalization is necessary at this time. Therefore, your application is being cancelled. However, outpatient treatment is recommended in your case. Attached hereto is Form 2827, which you are requested to complete and return to this office for necessary action. We trust this is satisfactory.

"Very truly yours,

"Richard A. Heyl, Supervisor, Eligibility Section."

Mr. Sanders, Sr.: Cross-examine.

. . . . . .

[fol. 1052] Dr. Richard Harding Fisher, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

. . . . . .

[fol. 1053] Q. 10. Now, what did you do before 1954 when you went with the Lewis-Gale?

A. I finished medical school in 1947. Then I served an internship. I took then a four-year residency in ortho-

pedics which was completed in 1952, and then I served two years in the United States Air Force, Chief, Orthopedic Service.

Q. 11. Lewis-Gale Hospital, I believe, is where the Norfolk and Western Railway Company sends their men when they are injured——

A. That is correct.

Q. 12. (Continuing) —to be treated down at Roanoke?

A. That is correct.

Q. 13. Doctor, did you have occasion to treat Carl Still, or to examine Carl Still, the plaintiff in this case?

A. I did.

[fol. 1054] Q. 14. When did you examine him?

A. February 28th, 1958.

Q. 15. How did you happen to examine him?

A. He was referred to our hospital from Bluefield by Drs. Hosmer and Raub.

• • • • • • •

[fol. 1055] Q. 22. Now, doctor, you say he advised you at that time that after the accident that he had continued on doing light work for four days?

A. That is correct.

Q. 23. At that time did you ask Carl Still whether he had had any previous difficulty with his back?

A. I did.

Q. 24. Why did you ask that question?

A. I do this in every examination of a patient having difficulties such as this—backs and necks and other things.

Q. 25. Is it important for you to get an accurate history as to how the accident happened and the pains and ailments that the patient is complaining of?

[fol. 1056] A. It has a great deal, as a matter of fact, to do with the type of treatment and the manner in which patients are handled, is the past history.

Q. 26. And when dealing with a low back disability, is it important that you find out whether the patient has ever had any previous difficulty with the back?

A. That is correct.

• • • • • • •

[fol. 1057] A. X-rays were made of this patient's low back and showed that there was a spondylolisthesis, or a slipping forward of the last vertebra on the sacrum, being slipped forward about one half the diameter of the body of the vertebra,——

Q. 34. Yes.

A. (Continuing) —or approximately three quarters of an inch. There was also narrowing of this joint and degenerative changes, or arthritic changes, on the upper portion of the sacrum. The joint was narrowed and there was some lateral lipping and whitening of the bones, indicative of a degenerative process.

Q. 35. Doctor, from your examination of these X-ray pictures showing this spondylolisthesis, did you form an opinion as to just how long this condition had existed?

A. It was my opinion that this had existed for several years, at least.

Q. 36. Why did you come to that conclusion?

[fol. 1058] A. Because of the nature of the changes on the X-rays, showing degenerative changes, which—the arthritis and the narrowing of these joints, which takes considerable time to develop.

Q. 37. Doctor, do you—is spondylolisthesis, the condition you describe here, is that an unusual condition that you find among your patients?

A. It is not in an orthopedic practice too unusual to see this condition in back disorders.

Q. 38. And what is the usual cause of this condition?

A. It is a—almost universally a congenital deformity, or defect, in the bone where there is a weakened area in the bone.

Q. 39. You say it's almost universally a congenital defect?

A. That is correct.

Q. 40. Do you often find this condition in people that so far as you know have had no accident, no previous accident?

A. That is true.

Q. 41. Doctor, what is the history of these spondylolisthesis cases? Suppose a person has a spondylolisthesis, a congenital condition that you have described, does that remain—that condition remain more or less static or does

it change from time to time? Do you understand my question?

A. Yes. Generally, a person can go along for a while without having difficulty and then frequently will experi- [fol. 1059] ence episodes of trouble or flare-ups of muscle spasm in the back, and then it can become chronic in the latter stage or as a person develops in age, gets older.

Q. 42. Now, what do you mean when you say the condition becomes chronic?

A. I mean that this condition—because of the nature of the defect, a person can develop symptoms or pain that can last over a period of time and be disabling.

Q. 43. Yes. Then do I understand that if a person has spondylolisthesis, that it can flare up from time to time without any apparent reason?

A. Usually on questioning you can determine that a person has had some light trauma, cough or sneeze; but mild conditions, mild twist and that sort of thing, can cause it, and sometimes even it will bother people without any history of any strain or anything of that nature.

Q. 44. I see. And then do those periods of flare-up, do they continue on and progressively get worse, or do they get better and stay the same?

A. It is a variable situation. You most often, or in a good per cent of times, they do tend to get worse as a person gets older. I have seen some old people, however, who have it, that don't necessarily complain of it. So it [fol. 1060-1061] is a variable thing as to how much trouble a person can actually have from this condition. You can't always tell from the X ray how much aching a person is actually having.

Q. 45. Is it possible for a person who has this condition to go along and do hard manual labor for years at a time without any difficulty, without feeling any disability?

A. It is possible, although most people are aware of having difficulty with their backs.

Q. 46. Yes. Doctor, do you know the duties of a yard brakeman fairly well?

A. I have a rough idea of their responsibilities and work.

Q. 47. If you were the examining physician and you had discovered a person in Carl Still's condition there with spondylolisthesis to the degree you have mentioned, would

you have recommended him for employment as a yard brakeman?

A. I would no' have.

Q. 48. Why not?

A. Because a demanding job or any demanding work requiring heavy use of your back might cause you to have difficulty, might aggravate it.

. . . . . .

[fol. 1062] Q. 60. Doctor, did you talk to Carl Still about performing surgery on his back?

A. I did.

Q. 61. What did you recommend to him?

A. It was recommended that he have a laminectomy, which means taking out a part of the bone in his back, the loose part, and freeing up the nerve, which is stretched over when these bones are slipped forward, and fusing this area which was weakened.

. . . . . .

[fol. 1063] Q. 63. Doctor, is that an operation that is commonly done?

A. It is very frequently done.

Q. 64. Is it done with relative safety?

A. It's as safe as any back—any general or major surgery.

Q. 65. And would you then—if that operation were done and the joints fused, would you expect that to relieve the pain?

A. I would assume that it would if the fusion—if he could heal the bone graft, I feel that it would give him a good result.

Q. 66. And you felt that was advisable in his case?

A. That is correct.

. . . . . .

[fol. 1064] Q. 71. Doctor, did I ask you this: Did you ask him if he had ever had any previous back trouble?

A. I did ask him.

Q. 72. And he denied that he had?

A. He denied having any difficulty with his back or having had any other injuries to his back.

Mr. Sanders, Sr.: Yes.

Cross examination.

By Mr. Walter O. Burton:

. . . . . .

[fol. 1065] Q. 2. That's what I mean, doctor, yes. Doctor, you have said that many people, or some people, not many, in your experience has this spondylolisthesis of the back without any disability and some of them even don't know they have it, is that true?

A. That is true.

Q. 3. Some of them have it and it's non-disabling; what I mean, they are able to work and go about and enjoy life the same as any other human being?

A. I have seen that, yes.

Q. 4. Yes, sir. But it can be, if they have it, become a disabling thing if their back is injured, isn't that true?

A. It can become disabling, as I pointed out, sometimes with injury, or sometimes it can become disabling without injury.

. . . . . .

Q. 6. Yes, sir. And an injury could exaggerate the condition if they had it and cause it to come into being and disable one, is that right?

A. It could, yes, sir.

Q. 7. Yes, sir. Now, doctor, how long was he in your [fol. 1066] hospital after he was admitted on the thirty-first, I believe you said, of March, '58?

A. That's correct. He was there until April 10th, or being present ten days.

Q. 8. What all did you do for him while he was there?

A. He was placed in a bed, on a hard bed, and traction applied to his leg. He was given heat treatments, rub-downs, and muscle relaxant drugs, and a brace was ordered for his low back.

. . . . . .

Q. 11. Doctor, the condition you found him in, as you found him, he was not able to work as a yard brakeman, was he?

A. At the time I saw him, I did not feel so.

Q. 12. And if his condition hasn't changed since, he is not now able to work as a yard brakeman, is he?

A. If the condition remains the same as it was when I saw him, he would not be able to.

Q. 13. At the time you saw him, he certainly couldn't do any heavy manual labor, is that right?

A. I would not think so.

[fol. 1067] Q. 14. And if his condition now is such that you saw him the last time, he couldn't do heavy manual labor, is that right?

A. If the condition remains the same, that is true.

Q. 15. Doctor, of course, you don't, as I understand you, attempt to tell the jury that he was born with this condition. He may have been born with it; it may have come on in later years; you don't know about that?

A. It's classified as congenital—or having been born with it, and the majority of times it can develop during the early years in the teens. In other words, you can't see X-rays good on children so that you can establish its presence. But it is felt to be a congenital defect, or an absence of normal growth of this area in the bone from early age.

. . . . . .

Q. 17. But in Carl Still's case, this particular case you are talking about, you don't know whether he had it when he was born, or whether it came on later, or just when it came on, now, do you?

A. I can say that at the time I saw him in 1958 that it came on a minimum of, I would say, three to four years or five years prior to this visit. Whether it oc-

[fol. 1068] curred when he was fifteen, or whether he was actually born with it, I cannot say. In view of the fact that there was such a marked slipping, I would feel that the chances are very good, or probable, or even likely, that he was born with it, because they don't develop that far in a relatively short period of time.

Q. 18. Can you say when, if ever, it became symptomatic?

A. Can I say?

Q. 19. Yes, sir.

A. I have two versions as to when it became symptomatic that I am aware of. According to the patient, it happened at the time of this accident. I have been made aware of records that it had been bothering him prior to this.

Q. 20. So you can't say one way or another, whether it became symptomatic at the time of the alleged injury or prior thereto?

A. I have an opinion to that effect. I mean, based upon——

Q. 21. I am talking about your own knowledge, from your examination and from what you saw, not from what records you got from somewhere else.

A. I don't—I have on that circumstance, then, only the information which the patient tells me, which is the accident. [fol. 1069] Q. 22. Yes. And there is a marked dislocation of that fifth lumbar vertebra on the sacrum, isn't there, doctor?

A. It is displaced about one half, which is marked as compared with what—the average type of this case that we see. We don't see too many that displaced, although I have seen them, and you do see them occasionally.

Q. 23. In other words, this one that you see on this man is displaced more than the ordinary one you do see, is that right, doctor?

A. That is correct.

Q. 24. Now, is it true, doctor, that that could be because this man was injured and that that injury displaced it more than the one that you ordinarily see?

A. It could be. That is not my opinion.

Q. 25. But it could be?

A. It could be.

Q. 26. Doctor, unless there is an operation, this man will never be able to do manual labor, will he?

A. I wouldn't—if he has done labor in the past with this, I think that it is possible that he can do what he has done in the past with the same condition.

Q. 27. Then, you think now, do you—I am speaking about what your X-rays showed you or what you saw—the ones taken in your hospital—and your examination—do you say now that it is your opinion that this man might

ever be able to go back working as a brakeman on the rail-
[fols. 1070-1078] road in this condition without an operation?

A. I feel that he can—it is possible, and even likely, that he could do the same thing that he has done in the past with the condition which he has. I would not particularly recommend it because I wouldn't want him to aggravate it—I mean, as a physician.

. . . . . .

[fols. 1079-1080] Re-direct examination.

By Mr. Sanders, Sd.:

. . . . . .

[fols. 1081-1096] Q. 3. Doctor, if a person would be involved in an accident sufficient to displace the vertebra, do you think the party would know about it at the time and have immediate pain in the back?

A. He would undoubtedly.

Q. 4. Yes. Doctor, one last question. Assuming that Carl Still had this spondylolisthesis, the condition which you found there in your X-ray pictures, assuming that he had that condition prior to January 23rd, 1958, and assuming he had had no accident, is there any way to tell whether he could have gone along indefinitely and performed his work as a yard brakeman, even though he had had no accident?

A. There is no way of saying absolutely that I know of, because these things come on by the slightest provocations at times. I mean a person can cough and it will aggravate it. It's a variable situation as to the mode of onset of symptoms.

Mr. Sanders, Sr.: That's all.

. . . . . .

[fol. 1097] Carl Still, the plaintiff herein, heretofore introduced as a witness on his own behalf, being recalled for further examination, testified as follows, while remaining in his chair at counsel table:

Re-cross-examination.

[fol. 1098] By Mr. Sanders, Sr.:

Q. 1. Is that your signature to this statement dated January 23rd, 1958, Carl?

Mr. Sanders, Sr., thereupon exhibited a paper to the witness.

A. Yes, sir.

Q. 2. That's your signature?

A. Yes, sir.

Q. 3. Is that the statement that you signed when you went down to Mr. Lilly's office right after the accident occurred?

A. Let me see.

Mr. Walter G. Burton to the Witness: Read it.

The witness thereupon examined the statement in question.

Mr. Walter G. Burton to the Reporter: Read him the question.

Mr. Sanders, Sr., to the Reporter: Read him the question, please.

The Reporter: (Reading from the record) "Is that the statement that you signed when you went down to Mr. Lilly's office right after the accident occurred?"

A. Yes, sir.

[fol. 1099] Mr. Sanders, Sr.: I want to offer it in evidence.

Mr. Walter W. Burton: Well, I want a re-direct on your re-cross-examination.

Mr. Sanders, Sr., to Mr. Walter W. Burton: Well, all right.

Mr. Sanders, Sr.: We offer this statement in evidence, Your Honor.

The Court: Let it be introduced.

Mr. Sanders, Sr.: And I want to read it to the jury.

Mr. Walter G. Burton: We don't object to it.

The Court: All right.

The statement dated January 23rd, 1958, identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 27. 10-9-59. N.V.H."

and is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

Mr. Sanders, Sr.: (Reading Defendant's Exhibit No. 27) "Bluefield, January 23rd, 1958.

"Mr. B. G. Lilly, Terminal Trainmaster.

"I reported on third trick west yard crew 11:15 P. M. [fol. 1100] January 22nd, in charge of yard conductor T. A. Taylor.

"About 12:30 A.M. on the 23rd, a draft of cars had been pulled back up the west yard lead and they were being classified. I was given one car, N. and W. 11878, to ride to No. 10 track in the westbound forwarding yard. I got on car before it was cut off, and I moved about 6 feet away from the other cars, and they were being shoved and coupled up to my car, and cars made a quick stop and I was jerked against end of car and bruised my left hip and upper part of my left thigh. I was located at the brake on the east end of car and I was standing on the brake step and was holding to the brake wheel. Car was equipped with an Ajax brake. I continued to work, and do not think I will lose any time. The brake on this car was operating properly. I have been bathing my leg to get the soreness out.

"After my car was cut off to me board was given to stop, but when cars moved back and coupled up to me, they made a quick jerk."

Mr. Walter W. Burton: Now, may I——

Re-direct examination.

By Mr. Walter W. Burton:

Q. 1. Carl, is that the same statement that you signed [fol. 1101] and you testified that you told Mr. Lilly was wrong when you signed it?

A. That's the statement.

Q. 2. That is the statement?

The Court: I expect you had best come back to the stand.

Mr. Walter G. Burton: I think so.

The plaintiff thereupon left his seat at the counsel table and sat in the witness chair on the witness stand.

By Mr. Walter W. Burton (Continuing):

Q. 3. Is that the same statement that you testified about that Mr. Lilly had written up before you ever got there that morning?

A. That's it there.

Q. 4. That is the statement?

A. Yes, sir.

Mr. Walter W. Burton: That's all.

Mr. Sanders, Sr.: That's all.

The Court to the Witness: That's all. You can go back.

Witness stands aside.

[fol. 1102] Dr. Roy E. Christie, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name, please, sir?

A. Roy E. Christie.

Q. 2. Are you a medical doctor?

A. I am.

Q. 3. Where do you live, Dr. Christie?

A. Fort Lee, Virginia.

Q. 4. How old are you?

A. Seventy-one past.

Q. 5. What is your business or occupation at this time?

A. Physician and surgeon.

Q. 6. Are you in general practice or otherwise?

A. General practice.

Q. 7. General practice. Where do you live now, you say?

A. Fort Lee, Virginia.

Q. 8. Fort Lee, Virginia?

A. Yes, sir.

Q. 9. Do you have any connection with the Army?

[fol. 1103] A. Civilian medical employee.

Q. 10 Did you ever work for the Norfolk and Western Railway Company as a medical examiner at Bluefield, Dr. Christie?

A. I did.

Q. 11. When did you work at that position?

A. From February 15th or 16th, 1948, until June 30th, 1949.

Q. 12. Give me those dates again.

Mr. Sanders, Sr., to the Reporter: Just read them.

The Reporter: (Reading from the record) "From February 15th or 16th, 1948, until June 30th, 1949."

By Mr. Sanders, Sr. (Continuing):

Q. 13. Were you then, working for the N. and W. on September 27th, 1948, as a medical examiner in Bluefield?

A. I was.

Q. 14. What were your duties as medical examiner there at Bluefield, Dr. Christie?

A. To give first aid to those coming in and to examine applicants for employment.

Q. 15. What was the procedure that you usually went through there in examining applicants for employment? Just your usual procedure.

[fol. 1104] A. The first thing, we received Form 88, a yellow sheet, authorizing us to examine them, from the employing officer. And then on Form 100-X, we asked a series of questions—who they were, their age—and measured them for height and weight and chest expansion and size and expiration, noticed the color of their eyes and hair, and examined the—there was a difference as to the type

of employment—but in the distant vision and close vision and hearing.

Q. 16. Did you make a physical examination?

A. Yes; we made practically a complete physical. It included the appearance of the eyes for infection or otherwise, the normality of the ears, nose, mouth, throat, teeth, neck, for tumors or otherwise, or twisting, the chest for form and for heart and lung conditions, the abdomen for the presence of tumors or ruptures, or hernias, and also for undescended testicles, varicoceles, or hydroceles, and the general shape of the legs, and for varicosities, and the presence of flat feet.

Q. 17. Did you take X-rays?

A. No, we didn't take X-rays unless the history indicated injury of the back or pelvis, or both back and pelvis.

Q. 18. Did you take histories from these applicants that you did——

A. Yes.

[fol. 1105] Q. 19. You took histories?

A. Yes. The history included a series of diseases, and do you want me to name them all?

Q. 20. Yes, in general.

A. Most of the conditions one runs into—as to whether they had ever had any nervous or mental condition; whether they had had any injuries or long-continued sicknesses or long period of being laid up from any cause; and that's about all I can think of offhand.

Q. 21. All right. Doctor, I hand you a card, which is on Form R.D. 100-X. At the top it says, "Norfolk and Western Railway Company, Physical Examination for Employment Only." It purports to be signed by Carl Still and by you, as medical examiner, and is dated Bluefield, West Virginia, September 27th, 1948. Now, what, if anything, do you know about that card, doctor?

A. I wrote up this card. The preliminary part of the history was taken by the secretary: as to what kind of work he was doing, where he was going to work, where he was born and when, and his ancestry—father dead, mother was living, wife, four brothers and three sisters and no children.

Q. 22. Doctor, I don't mean to read the card. Did you —how much of that card was prepared by you?

A. From the—"Have there been"—"Have any of the above had Tuberculosis or Insanity" down.

[fol. 1106] Q. 23. Yes. Then did you ask——

A. All the questions there.

Q. 24. Did you ask all the questions that are shown on this card, on the face of this card, beginning with the question, "Have any of the above had Tuberculosis or Insanity?"

A. Yes.

Q. 25. And you asked Carl Still these questions, and did you record correctly the answers which he gave you?

A. Yes.

Q. 26. And did you then have him sign the card?

A. I did, in my presence.

Q. 27. Do you have any personal recollection of this man at all, Doctor?

A. Not with regarding that specific examination, no.

Q. 28. You do know, however, that you filled out the card, beginning with the question, "Have any of the above had Tuberculosis or Insanity?"

A. Yes.

Q. 29. You filled out the answers to the questions?

A. Yes.

Q. 30. After he had answered the questions?

A. After he had answered them.

Q. 31. And he then signed the card, and you signed it, and then you filled out the "Medical Examiner's Certifi-

[fols. 1107-1110] cate" on the back, is that correct?

A. Yes, it is.

Q. 32. And was that card filled out in the usual course of your duty as medical examiner for the Norfolk and Western Railway Company?

A. Yes.

Q. 33. Doctor, at that time if you had known that Carl Still had a severe spondylolisthesis, which was a displacement forward of the fifth lumbar vertebra over the sacrum about one half of its diameter, would you have passed him for employment as a yard brakeman?

A. I did not examine him for a yard brakeman.

Q. 34. I mean as a section laborer.

A. No. not without first getting approval of no damaging effect from an X-ray.

Q. 35. You examined him here. This was an application for employment as a section laborer?

A. Section laborer.

Mr. Sanders, Sr., to the Witness: Now, this card that you are testifying from has been introduced in evidence as Defendant's Exhibit No. 7.

Mr. Sanders, Sr., to Counsel for the Plaintiff: Cross-examine.

* * * * * * *

[fol. 1111] W. R. Webb, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. W. R. Webb.

Q. 2. Where do you live, Mr. Webb?

A. At Glenwood Park.

Q. 3. Glenwood Park?

A. Yes, sir.

Q. 4. How old are you?

A. Thirty-six.

Q. 5. What do you do for a living?

A. Assistant yardmaster for the Norfolk and Western Railway Company.

Q. 6. And how long have you been assistant yardmaster for the Norfolk and Western Railway Company?

A. Since December, 1954.

Q. 7. And what did you do before that?

A. Clerk.

Q. 8. Clerk to who?

[fol. 1112] A. Clerk on the—in Bluefield, to Mr. Lilly.

* * * * * * *

Q. 10. Mr. Webb, do you remember the night that Carl Still reported an injury, the morning of January 23rd, 1958, down on the west yard in Bluefield?

A. I do, yes, sir.

Q. 11. Where were you when Carl Still reported that accident to you?

A. In the yard office.

Q. 12. Down on the west yard?

A. The west yard office.

Q. 13. What—did he come into the yard office?

A. Yes, sir.

Q. 14. Did he walk in there himself?

A. Yes, sir.

Q. 15. And what did he say to you?

A. He told me that he had been knocked up "agin" an end of a car.

Q. 16. And what else was said?

A. I told him that I would have to prepare a C.T. 37, of a personal injury report.

[fol. 1113] Q. 17. Yes. And what did he say?

A. He said, "No, let's don't prepare this report"; that "I would rather not make it." And I told Still that he would have to stay in the office until I prepared this report, that the Company required them; you have to make a report.

Q. 18. And while Carl Still, then, was in the office, you did prepare the C.T. 37 report and signed Mr. Lilly's name to it.

A. I did.

Q. 19. Is that correct?

A. Yes, sir.

Q. 20. Now, at that time did Carl Still appear to be in such condition that he couldn't work?

A. No, sir.

Q. 21. Did he ask to mark off on account of his accident?

A. No, sir.

Q. 22. Did he ask to mark off sick or anything like that, Mr. Webb?

A. No, sir.

Q. 23. If he had told you at that time that he was not feeling able to work, would you have marked him off sick?

A. I would have, sir.

[fol. 1114] Q. 24. And did he have the right at that time, if he wanted to, to mark off sick?

A. Yes, sir.

Q. 25. And is that generally done by the employees down there on the railroad whenever they want to mark off sick?

A. That is right, sir.

Q. 26. Then, following that, where did Carl work with reference to your office, Mr. Webb?

A. Where did he work?

Q. 27. With reference to your office, yes.

A. Well, the office is located right on the switching lead, I don't know how far the distance is, but it is very few steps from the office to the lead.

Q. 28. Now, following this accident, so far as you know, did Carl remain on the job that night?

A. He continued to work.

Q. 29. And how long did he stay on the job there—for several days?

A. As far as knowing, to the best of my knowledge, sir, he continued to work, yes, sir, the balance of his——

Q. 30. During that time did he ever tell you he was not able to work?

A. Yes, sir.

[fol. 1115] Q. 31. Or did you find out from anybody that he was claiming he wasn't able to work?

A. No, sir.

Q. 32. If he had claimed he wasn't able to work, would you have had him marked off?

A. Yes, sir.

Q. 33. Following that night and up until the time that he marked off on February 2nd, so far as you personally know, did he stay on the job and perform his usual, regular duties?

A. As far as I know, he did, sir.

Q. 34. As far as you know. In other words, if he didn't perform his duties, you didn't know anything about it?

A. That's correct, sir.

Q. 35. Now, Mr. Webb, do you know Mr. A. N. Davis, the engineer on the train that Carl complained of having this accident on?

A. I do, sir.

Q. 36. How long, to your knowledge, has Mr. Davis been a locomotive engineer for the Norfolk and Western?

A. That, I would not know, sir, the exact length of time, sir, but I know that he was a fireman on the yard when I

was hired in 1942, and then he was promoted to an engi-
[fol. 1116] neer.

Q. 37. Have you observed him, the manner in which he operates locomotives, during the last several years?

A. I have.

Q. 38. Do you consider him a competent, careful engineer?

A. I do, sir.

Q. 39. Have you ever observed him handling his train or his engine in a rough or an improper manner?

A. No, sir.

Q. 40. Have you ever heard any of the brakemen or conductors, or anybody, make any complaint about the way that Mr. Davis handled his engine?

A. No, sir.

Q. 41. Has anybody ever reported to you that he handled his engine in an improper manner?

A. No, sir.

Q. 42. One other question. Mr. Webb, if anybody had made any complaints about Mr. Davis, the engineer, who should the complaints have been made to?

A. Been made to me, sir,——

Q. 43. Yes.

A. (Continuing) —or the official on duty.

Q. 44. They would have been made to you?

[fols. 1117-1119] A. That's right.

Q. 45. And there have never been any such complaints made?

A. No, sir.

Cross-examination.

By Mr. Walter G. Burton:

Q. 1. Mr. Webb, was Carl an employee of the railroad company and working that night?

A. Yes, sir.

Q. 2. If he hadn't been, you wouldn't have filled out the form, would you?

A. That's correct.

Q. 3. He did tell you that he was thrown up against the end of the car and hurt?

A. He told me that in the office as I was preparing the C.T.

• • • • • • •

[fol. 1120] Q. 27. Now, on this Plaintiff's Exhibit No. 17, there is something on here I want to ask you about, Mr. Webb. Down here it says: "If the injury was the result of defective tools, machinery, engines, cars or property owned or controlled by the Company, give report and disposition here." That's under "Y." Then on this, in answer to that question, you say: "Inspected by Mr. Combs —Car in OK condition." What's that next word?

A. All.

Q. 28. "All s-a-f——

A. e-t-y, safety.

Q. 29. (Continuing) —"safety appliances OK." Well now you didn't put that on there while Carl Still was in there talking to you that evening, did you?

[fol. 1121] A. I did not, sir.

• • • • • • •

[fol. 1122] Q. 39. But at any rate, Mr. Webb—I know you are being entirely fair about it—you put that on there afterwards?

A. I did.

• • • • • • •

Robert L. Beavers, Jr., another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

[fol. 1123] By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. Robert L. Beavers, Jr.

Q. 2. Where do you live, Mr. Beavers?

A. I live in Williamson, West Virginia.

Q. 3. How old are you, sir?

A. Thirty-one years old.

Q. 4. What do you do for a living?

A. Night general yardmaster for the Norfolk and Western.

Q. 5. At Williamson?

A. At Williamson, West Virginia.

Q. 6. And how long have you held that position?

A. For the past thirteen months.

Q. 7. And what did you do before that?

A. I was night yardmaster at Bluefield, West Virginia.

Q. 8. How long did you hold that position?

A. For a period of one year.

Q. 9. And what did you do before that?

A. I was assistant yardmaster for the Norfolk and Western in Bluefield, West Virginia.

Q. 10. How long did you hold that position?

[fol. 1124] A. For a period of one year.

Q. 11. And what did you do before that?

A. I was a yard clerk for the Norfolk and Western in Bluefield, West Virginia.

Q. 12. Who did you work for? Whose clerk?

A. I was just a yard clerk.

Q. 13. A yard clerk, yes.

A. Yes, sir.

Q. 14. Mr. Beavers, do you remember the morning of January 23rd, 1958, when Carl Still reported an accident that happened down on the west yard?

A. Yes, sir, I do.

Q. 15. Did you see him the night that he reported that accident?

A. Yes, sir, I did.

Q. 16. Where and when did you see him?

A. I saw him in the west yard office.

Q. 17. How did you happen to see him?

A. Mr. Webb, the assistant yardmaster on duty, called me in the east yard and notified me that Carl Still had reported that he had been injured and asked me to come to the west yard. And when I got to the west yard, Mr. Webb had just completed the C.T. 37, and Still was still in the [fol. 1125] yard office, and I talked to Still at that time and asked him if he was hurt.

Q. 18. What did he say?

A. He told me that he had been jerked up against the end of a hopper due to slack action and had bruised his left hip.

Q. 19. At that time did he appear to be seriously disabled, Mr. Beavers?

A. No, sir, he did not.

Q. 20. At that time was anything said about whether he was able to continue working?

A. He said that he would continue on duty and perform his duties.

Q. 21. Did you ask him to do that?

A. No, sir, I did not.

Q. 22. Did he voluntarily tell you that he would continue on with his duties?

A. Yes, sir, he did.

Q. 23. If he had been disabled and not able to work, could he have marked off at that time?

A. Yes, sir, he could have.

Q. 24. That would have been quite a simple matter for him to mark off?

[fol. 1126] A. Yes, sir.

Q. 25. How do men mark off when they want to get off for any reason on the railroad? How do they go about it?

A. They have a timekeeper clerk who is on duty twenty-four hours a day. They can just pick up the telephone and tell him and mark off.

Q. 26. Mr. Beavers, did you later from time to time see Carl Still any more after he reported the accident and until he marked off definitely—finally on February 2nd, 1958?

A. Yes, sir, I did.

Q. 27. During that time did you know that he was not performing his regular duties down there in the west yard?

A. No, sir, I did not.

Q. 28. Did you give him permission to go down there and just sit down and not to perform his duties?

A. No, sir, I did not.

Q. 29. And you—so far as you knew, was he performing his duties?

A. Yes, sir, as far as I knew, he performed his regular duties.

Q. 30. Of course, you didn't see him all the time and you don't know exactly what he did do?

A. That's right.

[fol. 1127] Q. 31. Now, when did you find out that he was not performing his regular duties?

A. Well, on the morning of January 31st, I found Still in the brakemen's shanty on the west yard, and I asked him why he wasn't performing his duties, and he didn't give me any answer, and I told him he would either perform his duties or go home.

Q. 32. At that time did he tell you that he was not able to work?

A. No, sir, he did not.

Q. 33. He did not. What, if anything, did he say?

A. He made no comment, and I told him to either perform his duties or go home; and he left the brakemen's shanty and went over an embankment, and I took it for granted that he went home.

Q. 34. Yes. Now, Mr. Beavers, you know A. N. Davis, the engineer of the train involved in this accident?

A. Yes, sir, I do.

Q. 35. How long have you been knowing A. N. Davis?

A. I have known Mr. Davis for a period of eight years, I would say.

Q. 36. And during that time have you had occasion to observe the manner in which he operates the engines and [fol. 1128] locomotives and trains?

A. Yes, sir, I have.

Q. 37. Do you consider him a good, competent engineer?

A. Yes, sir, I do.

Q. 38. Do you know of any criticism that you could make of him as an engineer?

A. No, sir.

Q. 39. Have you ever heard any of the brakemen, the conductors, or anyone else down there complain about the manner in which Engineer Davis performed his duties?

A. No, sir, I have never had any complaint on Mr. Davis's work.

Q. 40. If there had been a complaint down there from anybody about Mr. Davis, do you think that you would have heard about it?

A. Yes, sir, I would have.

Q. 41. So far as you know, has Mr. Davis ever damaged or destroyed any company property in the handling of his trains?

A. No, sir, not to my knowledge.

Mr. Sanders, Sr. to Counsel for the Plaintiff: Cross-examine.

Cross-examination

[fols. 1129-1130] By Mr. Walter G. Burton:

* * * * * * *

[fol. 1131] Q. 19. Didn't have any cane. Now, is that the morning you told him this, and I quote: "Mr. Beavers told me"—I mean, "Mr. Lilly told me to tell you to stay here the whole eight hours and he means for you to stay here the whole eight hours?" Did you tell him that?

A. No, sir, I never made that statement.

Q. 20. Did you make any statement similar to it?

A. No, sir.

* * * * * * *

[fol. 1132] Q. 28. Did they have a policy down there known as "light work" for a man who had been slightly injured—give him a light job, let him sit around?

A. I have never known of a man to sit around. A man might have a sprained ankle or something, and they might [fol. 1133] change his duties to light duty, authorize light duty, but I have never known them to let anyone sit around.

* * * * * * *

[fol. 1134] Q. 35. Uh-huh. Didn't you tell him yourself that morning that he couldn't mark off until he saw Mr. B. G. Lilly?

A. No, sir, I did not.

* * * * * * *

Q. 40. And you deny to this jury that you told Carl Still that morning, or any other night or morning before February 2nd, that he couldn't mark off until he saw Mr. B. G. Lilly?

A. I never refused Still of the privilege or right to mark off.

. . . . . .

[fols. 1135-1138] Q. 42. And you never at any time after Carl Still got hurt, on that morning or any successive night thereafter until February 2nd, that he had left early the previous night, told him that Mr. B. G. Lilly meant for him to stay on that job the eight hours; do you deny you did that?

A. No, sir, I never made a statement like that.

. . . . . .

[fol. 1139] W. C. Wilson, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name, please?
A. W. C. Wilson.
Q. 2. W. C. Wilson?
A. Yes, sir.
Q. 3. Where do you live. Mr. Wilson?
A. At 249 Mt. View Avenue, Bluefield, West Virginia.
Q. 4. And how old are you, sir?
A. I'm seventy years of age.
[fol. 1140] Q. 5. Are you retired now?
A. Yes, sir, I am.
Q. 6. Did you formerly work for the Norfolk and Western Railway Company?
A. I did.
Q. 7. And how long did you work for the Railroad Company all together?
A. Well, it was something like forty-eight years.
Q. 8. What all kinds of work did you do for the Railroad Company during that time?
A. Well, I was clerk—I was checker at first on the yard. I was yard clerk and clerk in the terminal trainmaster's

office for several years, and I was chief clerk to the terminal trainmaster about seventeen years.

Q. 9. At the time—when were you retired, Mr. Wilson?

A. May 1st, 1958.

Q. 10. And at that time were you Mr. Lilly's—Mr. B. G. Lilly's—clerk?

A. Yes, sir.

Q. 11. He was the terminal trainmaster?

A. Yes, sir, he was the terminal trainmaster.

Q. 12. Now, Mr. Lilly—Mr. Wilson, was it one of your duties as Mr. Wilson's clerk—Mr. Lilly's clerk, that when any of the employees would report an accident to you, that you would get a statement from them, interview them and get a signed statement from them?

[fol. 1141] A. Yes, sir.

Q. 13. Was that a company rule?

A. Yes, sir.

Q. 14. And if the employee that was injured was not able to come to your office, how did you get the statement?

A. Well, sometimes we had to go to where they might be located, or if he was in the hospital, we would go to the hospital. We have done such.

Q. 15. But it was a rule that you had to get the statement?

A. We had to get a statement from him.

Q. 16. Yes.

A. Yes, sir.

Q. 17. Now, on January 23rd, the morning of January 23rd, 1958, did Carl Still, the plaintiff, come to your office there in Bluefield and report an accident to you?

A. He came to the office and I took a statement from him.

Q. 18. Yes. Now, there has been a statement introduced in evidence here, Defendant's Exhibit No. 27. It seems to be a carbon copy, but it's signed, "Carl Still"; witnessed, "W. C. Wilson." Is that the statement that you took from Carl Still on that occasion?

A. Yes, sir, this is the copy of the statement.

Q. 19. Now, when did you prepare that statement? Did you prepare it before Carl Still came into your office, or [fol. 1142] did you prepare it when he was in your office? Tell the jury how you prepared it.

A. No, I did not prepare it before he came in the office,

but I wrote the statement on the typewriter as he gave it to me while he was in the office.

Q. 20. And is this what he told you, what you wrote down on the typewriter and what he signed at the time?

A. Yes, sir.

Q. 21. And I notice here that in this statement he says: "I continued to work, and do not think I will lose any time." Is that what he told you?

A. Yes, sir.

Q. 22. At that time did Carl Still appear to be disabled to the extent that he wasn't able to work?

A. No, he did not.

Q. 23. If he had been, could he have marked off?

A. Yes, sir.

Q. 24. Was Mr. Lilly in the office that morning, too, when he came in?

A. Well, he came out of his office into the office where I was working, the clerk's office——

Q. 25. Yes.

A. (Continuing) —and he told me——

Mr. Walter G. Burton: Now, just a minute.

A. (Continuing) —to take Yard Brakeman Carl Still's——

[fol. 1143] Mr. Walter G. Burton: Just a minute.

The Court to the Witness: Just a moment, please, sir.

Mr. Sanders, Sr.: We object to that shouting.

Mr. Walter G. Burton: I hate to do that.

Mr. Sanders, Sr., to Mr. Walter G. Burton: You need not yell at the witness.

The Court: I understood this all occurred in the presence of Carl Still.

Mr. Sanders, Sr.: It did.

Mr. Walter G. Burton: I was going to try to find out, Your Honor. That was my purpose. That was all I was going to try to do. If Lilly came in and said anything, we don't object to it. I don't know whether he was or not. We withdraw it.

By Mr. Sanders, Sr. (Continuing):

Q. 26. Go ahead, Mr. Wilson. Was Mr. Lilly in there when Carl Still was there?

A. He came in the office about the time Carl Still came in, and he told me to take Brakeman Still's statement.

Q. 27. And you did it?

A. Which I did.

Q. 28. Yes.

A. And after I had typed it as it was given to me, uh—[fol. 1144] Brakeman Still signed the statement and I witnessed it—witnessed his signature.

Q. 29. And what you have in this statement is exactly what he told you?

A. That's exactly what he told me, sir.

Mr. Sanders, Sr., to Counsel for the Plaintiff:
Cross-examine.

Cross-examination.

By Mr. Walter G. Burton:

* * * * * * *

[fol. 1145] Q. 8. You don't know how Carl Still happened to come there that morning?

A. No, sir, I do not.

Q. 9. You do know that Mr. Lilly came in and asked you to take a statement from him?

A. Yes, sir, he told me to take the statement.

Q. 10. Was Carl Still there when he told you that, or did Lilly come in before Carl Still got there, or how?

A. Yes, Carl Still was in the office.

Q. 11. Mr. Lilly talked to Carl Still there before you took the statement?

A. I do not know, sir.

Q. 12. It was there in your presence, wasn't it?

A. Well, Mr. Lilly just came in the office where I was working——

Q. 13. Yes.

A. (Continuing) —the adjoining room—came out of his office and told me to take Yard Brakeman Carl Still's statement, which I did, sir.

Q. 14. Yes, uh-huh. Well, did Mr. Lilly say anything [fol. 1146] to Carl Still in your presence there?

A. No, not that I know of. I don't——

Q. 15. Did Carl Still ever go into Mr. Lilly's office?

A. I don't know.

Q. 16. So far as you know, Carl Still stayed in your office the whole time he was there?

A. Yes, until he left.

Q. 17. And if there was any conversation between he and Mr. Lilly, it happened right there in your presence, if there was any, is that right?

A. I—there was no conversation that I know about.

• • • • • • •

Q. 19. Did you hear Lilly tell him not to mark off, that he would take care of him?

A. No, sir.

Q. 20. Did you hear Lilly tell him not to go to any [fols. 1147-1156] doctor?

A. No, sir.

Q. 21. Do you say any part of any of those things happened there that morning, or do you say they didn't happen?

A. No, none that I know about.

• • • • • • •

[fols. 1157-1158] Q. 84. Yes, sir. Now, isn't here what happened, Mr. Wilson: Isn't it a fact that either Mr. Lilly brought that report in there and dictated this or you took the report and dictated it, and that you had it there when Carl Still came in and told him to sign it? Now, isn't that what happened?

A. No, I did not.

Q. 85. That didn't happen?

A. I wrote that statement, as I previously stated, as he gave it to me while he was present.

• • • • • • •

[fol. 1159] A. N. Davis, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. A. N. Davis.

Q. 2. Where do you live, Mr. Davis?

A. In Bluefield, Virginia.

Q. 3. How old are you?

A. Fifty-four.

Q. 4. What do you do for a living?

A. I'm the yard engineer for the N. and W.

Q. 5. How long have you been a yard engineer?

A. It was thirty-five years last July.

Q. 6. What all kinds of locomotives have you run?

A. Well, all the different types they have had except electric motors and 600 passenger engine.

Q. 7. Yes. Mr. Davis, you were the engineer on the engine that was pushing this draft of cars the night that Carl Still claims he was injured?

A. They said I was. I didn't know it happened until [fol. 1160] two or three days after it occurred.

Q. 8. Well, it is a fact that you were the engineer operating the engine that was pushing that train of cars. Now, on that particular night, when did you find out that Carl Still was claiming that he was hurt?

A. Well, it was two or three days after it happened that someone mentioned it to me. I didn't know it happened.

Q. 9. Is that right? Are you right sure, now, Mr. Davis, when it was reported to you? I mean can you be sure that it wasn't reported to you that night or the next day, or the following day?

A. I am very sure of it. I didn't know anything about it until——

Q. 10. And to the best of your judgment, when do you think it was first reported to you?

A. Well, it might have been the next night or the second night after it happened. I couldn't——

Q. 11. Now, then, when it was reported to you, you were told when it had occurred, is that correct? And then did you think back to what you were doing on the night that the accident is supposed to have occurred?

A. Well, it was just another night, Mr. Sanders.

Q. 12. Yes.

[fol. 1161] A. I mean, everything went along like it had every other night before. There was nothing unusual happened as far as the train movement was concerned or anything that I would know that something unusual had occurred.

Q. 13. Now, on the night this accident occurred, if it happened when you were told it happened, to the best of your knowledge and information, were you operating your engine in the usual and customary manner that you would operate it——

A. Yes, sir, I was.

• • • • • • •

[fol. 1162] Q. 16. I believe you were classifying cars; you were dropping cars into the classification tracks. Is that more or less of a routine operation, Mr. Davis?

A. It is.

Q. 17. In this train that you were handling, I believe the evidence will show there were sixty-nine empty cars and your engine was on the east end of it, and it was moving slowly down the track, and somebody cut off the car to Carl Still and he took the car down the track a short distance and then the train coupled up to it. That's what occurred.

A. That's what I was told. I was sixty-eight cars away. I don't know what happened.

• • • • • • •

[fol. 1163] By Mr. Sanders, Sr. (Continuing):

Q. 18. Mr. Davis, on the night this accident is supposed to have occurred, you say you were engaged in a routine switching operation?

[fol. 1164] A. That's right.

Q. 19. You don't remember exactly when the accident occurred?

A. I have no knowledge of it at all. As I say, it was merely routine handling of a train.

Q. 20. Routine handling. And when you are pushing a train down the track for the purpose of cutting off cars and classifying them, how do you usually perform that operation? What is the operation?

A. Well, we work by signals. They have a yellow board and we start moving the cars; and if they want us to stop, they turn the board red, and we stop; and when they turn it yellow we start shoving them again.

Q. 21. And do you move slowly as you——

A. Four or five miles an hour.

Q. 22. Four or five miles an hour. You didn't know when this accident occurred, then. Did you on this night that it is supposed to have happened, so far as you know, fail to observe any red boards that were given you to stop?

A. I did not.

Q. 23. Now, when you have got a train of cars like that and you are pushing them down the track for classification purposes, is there any air on the train?

[fol. 1165] A. Not when they cut them up. When they classify them and cut them up—one, two, three, or ten at a time—they bleed the air off them because if the air is on the cars—sometimes they will have a train that doesn't cut up, and they will put air all the way through it and shove it on down into the lower yard.

Q. 24. On this particular movement you were making, so far as you know, did you have your air coupled up on the train or——

A. Sometimes they put five or six cars next to the engine so that you can make a quicker stop.

Q. 25. Yes. Would you have any idea how you made the stop?

A. Made it with the engine brake.

Q. 26. Made it with the engine brake?

A. The "bulldog," they call it.

Q. 27. And that brake—what kind of a brake is it?

Mr. Walter G. Burton: What was that brake?

The Witness: Bulldog brake.

Q. 28. And that's the brake on the engine?

A. It's on the engine and tank. It doesn't apply onto the cars at all.

• • • • • • •

[fol. 1166] By Mr. Sanders, Sr. (Continuing):

Q. 29. So, now, Mr. Davis, that's all that you know about it?

A. That's right.

Q. 30. So far as you know and believe, were you on the night that this accident occurred attempting to perform your duties and to handle your engine in a proper manner?

A. I was.

Q. 31. So far as you know?

[fols 1167-1169] A. I was.

Q. 32. Sir?

A. Yes, sir.

Q. 33. So far as you know. How long have you been operating engines, you say?

A. I was promoted in 1944 and I was first marked up in 1948.

Q. 34. Now, there has been a good deal of evidence in here to the effect a lot of the brakemen have complained about the manner in which you handled the engine and train. Have you ever in your entire service with the railroad ever been disciplined or reprimanded for your handling of the engine or the train?

A. No, sir, I have not.

Q. 35. During the entire time that you have been working for the railroad company have you ever been disciplined or reprimanded for anything at all except for over-sleeping one morning when you were called out to work?

A. That's all.

Q. 36. That's the only time in your experience that you have ever been disciplined or reprimanded by your superiors for your handling of trains or engines, or anything else?

A. That's right.

• • • • • • •

[fols. 1170-1177] Cross-examination.

By Mr. Walter G. Burton:

. . . . . .

[fols. 1178-1182] Q. 43. In other words, you have been engaged in these switching operations for years and you have no knowledge of what's going on or what's happening to the west end of your train. Now, do you want to admit that to this jury?

A. Well, how would I know it? I can't see that far.

. . . . . .

[fol. 1183] Q. 71. That's right. And this string of cars, if you put the brake on fast or stop quick and let the slack go out of those cars in a westward direction, the last one is the one that actually gets the quick jerk or jar, isn't it?

A. That's right.

. . . . . .

Q. 73. Yes, sir. So, you don't know whether you were looking at the board the night Carl Still was hurt or your fireman was, is that right?

[fols. 1184-1199] A. I don't know whether it was on my side at that time or whether it was on the fireman's side.

Q. 74. It was the duty of the conductor down there operating that board, wasn't it—Mr. Taylor? Did you ever work with him? Now, he can see the movement of the train and the west end of it and the cars that are cut off and where they are. It is his duty to watch the west end of that train and those cars, isn't it?

A. I don't know what his duties are. I am only concerned with mine.

Q. 75. You have no idea, do you, Mr. Davis, what his duties are?

A. I am not a conductor.

. . . . . .

[fol. 1200] D. W. Weiser, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. Your name is D. W. Weiser?
A. That is correct.
Q. 2. Where do you live, Mr. Weiser?
A. I live at College Terrace Apartments, Bluefield, West Virginia.
Q. 3. And what do you do for a living?
A. Assistant yardmaster for the Norfolk and Western.
Q. 4. What division?
[fol. 1201] A. Pocahontas Division.

* * * * * * *

[fol. 1202] Q. 13. Did you call Carl Still on the morning of January 23rd, 1958, or at any other time and direct him to report to the office of Mr. B. J. Lilly?
A. No, sir.
Q. 14. As a matter of fact, Mr. Weiser, how long was it before you found out that Carl Still was claiming that he had an accident and was injured on January 23rd, 1958?
A. It was several months later when I found it out.
Q. 15. And you are positive you made no such calls?
A. That's right, sir.

* * * * * * *

[fol. 1203] Re-direct examination.

By Mr. Sanders, Sr.:

Q. 1. Do you know that anyone called, Mr. Weiser?
A. I don't have any knowledge of anybody calling him.

* * * * * * *

[fol. 1204] Re-direct examination.

By Mr. Sanders, Sr. (Continuing):

Q. 2. Mr. Weiser,——

A. Sir?

Q. 3. (Continuing) —he asked if you made either of these two calls on January 23rd or if you knew whether they were made. You said, "No." Did you request any of the clerks or anyone else to make the calls?

A. No, I did not. I had no knowledge of the injury [fol. 1205] at all. I didn't know anything about it.

* * * * * * *

P. R. Hager, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. P. R. Hager.

Q. 2. Where do you live, Mr. Hager?

A. I live on the Brush Fork-Littlesburg Road.

Q. 3. What do you do for a living?

A. I am a clerk for the roadmaster, district number eleven.

Q. 4. For the Norfolk and Western Railway Company?

A. Yes, sir.

Q. 5. Who is the roadmaster?

A. J. J. Kendrick.

[fol. 1206] Q. 6. How long have you been such clerk?

A. With Mr. Kendrick, approximately two years.

Q. 7. It's in evidence here, Mr. Hager, that Carl Still, the plaintiff in this case, applied to the Norfolk and Western Railway Company for employment as a laborer in 1943, and was accepted, and later applied for work again with the Norfolk and Western in 1948, and was accepted. Do you have in your custody the Norfolk and Western permanent records showing the time that Carl Still did work on those occasions?

A. Yes, sir.

Q. 8. What—when did he work in 1943?

A. In June, the first half of June, 1943.

Q. 9. How much did he earn during the entire first half of June, 1943?

A. (Witness refers to records) Eight dollars and eighty cents.

Q. 10. And so far as your records show, did that end his employment at that time?

A. So far as the records indicate.

Q. 11. Yes. Now, did he work for the Company again in 1948?

A. Yes, sir, he did.

Q. 12. How much did he work in 1948 and when?

A. On the twenty-ninth day of September, 1948, Carl Still, according to the pay sheet, went to work at seven [fols. 1207-1208] a.m. He left the service at ten a.m. He worked three hours.

Q. 13. What is the rate of pay?

A. Ninety-nine cents an hour.

* * * * * * *

[fol. 1209] T. A. Taylor, Jr., another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. T. A. Taylor, Jr.

Q. 2. How old are you, Mr. Taylor?

A. Thirty-six.

Q. 3. And where do you live?

A. In Bluefield.

Q. 4. What do you do for a living?

A. I'm a yard brakeman.

Q. 5. For the Norfolk and Western Railway Company.

A. Yes, sir.

Q. 6. How long—do you act as a conductor sometime?

A. Yes, sir, extra conductor.

Q. 7. Extra conductor. And how long have you been a yard brakeman?

A. Since 1947.

Q. 8. And how long have you been an extra conductor?

A. About three years.

• • • • • • •

[fol. 1210] Q. 11. Mr. Taylor, were you working down in the west yard on the early morning of January 23rd, 1958, when Carl Still claims that he was injured in a coupling—switching operation?

A. Yes, sir.

• • • • • • •

Q. 13. You were acting as a conductor that night?

A. That's right, yes, sir.

Q. 14. Just before this accident is supposed to have occurred which way was this train moving?

A. It was pulled from the westbound forwarding yard, classification yard, and pulled in back to classify it, to cut out shop cars.

Q. 15. Which way was it moving just at the time it coupled up to the car that Still was on?

A. West.

• • • • • • •

[fol. 1211] Q. 20. And just immediately before the train coupled up to the car Still was on, you say the train was being pushed westerly by the engine?

A. Yes, sir.

• • • • • • •

Q. 23. Did you see—notice the car that Carl Still was on in the train before the train coupled up to the car?

A. Yes, sir, I told him to take the car to the shop track.

• • • • • • •

[fol. 1212] Q. 25. Yes. Well, now, did you see—you did see the train as it was moving west and before it coupled up to the car Still was on?

A. Yes, sir.

Q. 26. Now, about what rate of speed was the train moving, so far as you can estimate?

A. Well, I would say approximately three or four miles an hour.

Q. 27. Yes. Now, Carl Still was on the car on the end towards the west, wasn't he?

A. He was on the east end of the hopper, yes.

Q. 28. On the east end of the hopper, but that hopper was on the west end of the train before it was cut off?

A. Yes, sir.

Q. 29. And you intended to cut that car off and send it down on the shop track?

A. Yes, sir.

• • • • • • •

[fol. 1213] Q. 32. In that operation there did you intend to stop the train after Still's car was cut off, or did you intend to keep the train in motion?

A. Keep the train in motion if it was possible.

Q. 33. And why did you intend to do that?

A. Well, we don't stop a train for anything unless you have to, unless you run out of men.

Q. 34. Was it usual and customary in a switching operation of this kind for the train to continue on in the direction it was going after the car was cut off?

A. Yes, sir.

Q. 35. Well, then—so, you didn't intend to stop the train?

A. No, sir.

Q. 36. Well, when this car was cut off, did you expect the car that Still was on to move on away and get out of the way of the train?

A. I thought he would, yes, sir.

Q. 37. Was that the usual and customary practice?

A. Yes, sir.

Q. 38. Well, then in this case, what occurred there?

A. Well, I don't really know. The cars were coming together, and I threw a red board to stop it.

[fol. 1214] Q. 39. Yes. Did you then observe that the west end of the train was catching up to the car Still was on?

A. Yes, sir.

Q. 40. Then you decided to give a red board to stop the train?

A. To prevent coupling up, yes, sir.

Q. 41. Why did you give a red board?

A. To keep from coupling to the car.

Q. 42. If you had coupled, would that have delayed the train movement in any way?

A. You mean by stopping it?

Q. 43. Yes, sir.

A. Yes, it would have delayed it.

Q. 44. And what would you have to have done then?

A. Just go on working; that's all you can do.

Q. 45. At that time did it occur to you that as the rear end of this train was about to couple onto the car that Still was on that Still was in any danger of being hurt?

A. I didn't think so, no, sir.

Q. 46. It didn't occur to you?

A. No, sir.

Q. 47. Then about how far was the west end of the train from the car that Still was on when you gave the red [fol. 1215] board?

A. Well, I would say from a half a car-length to twenty feet.

Q. 48. Yes. And, then, when you gave the red board, did the train stop?

A. Well, it stopped, yes, sir.

Q. 49. It stopped. Did it make, in your opinion, a reasonably good stop?

A. I thought so.

Q. 50. Yes. Was there anything, so far as you could see, there on that occasion about the stop that was out of the ordinary or unreasonable?

A. No, sir.

Q. 51. Then, did you see Harry Manns try to get down in between these cars to cut them off?

A. You don't have to get between them.

Q. 52. I mean——

A. I saw him try to make a run to try to keep them cut off after they started to couple.

Q. 53. You saw Harry Manns run down there to be there to cut the car off if it did couple?

A. Yes, sir.

Q. 54. Did Harry get there in time to cut the car off?

[fol. 1216] A. Not until the slack ran out.

Q. 55. Not until the slack ran out?

A. He cut it off when the cars bounced back.

Q. 56. And did you see Still then after the train coupled up to the car?

A. No, sir. After it completely coupled, I couldn't see him. I saw him just before it coupled.

Q. 57. You were not looking at him, then, when he claims he got hurt?

A. I was looking in that direction. I couldn't see him.

Q. 58. But you didn't see him?

A. That's right.

Q. 59. Then you say after the cars coupled and stopped, the slack ran out?

A. Yes, sir.

Q. 60. About how much slack ran out—slack in about how many cars, Mr. Taylor, would you say?

A. Well, about four or five cars of slack.

Q. 61. Four or five cars. Was there anything unusual about that—the slack running out of four or five cars in an operation of that kind?

A. I wouldn't think so.

* * * * * * *

[fol. 1217] Q. 63. Well, did Carl Still—what happened to the car that Carl Still was on?

A. Well, Sport Manns—or Harry Mans cut the car [fol. 1218] off and it rolled away and Carl stopped it.

Q. 64. Did you see him climb down off the car?

A. Yes, sir; and I put another man on the car.

Mr. Walter G. Burton: We object to the leading and suggestive question.

The Court to Mr. Sanders, Sr.: Don't lead the witness.

By Mr. Sanders, Sr. (Continuing):

Q. 65. How far did the car Carl Still was on roll down after Harry Manns cut it off the second time?

A. I would say a half a car-length at least.

Q. 66. And you say it then stopped?

A. Yes, sir.

Q. 67. And what did Carl Still do?

A. He climbed off the car.

• • • • • • •

[fols. 1219-1221] Q. 70. But you did see him climb down off of the car?

A. Yes, sir.

Q. 71. And what did he do?

A. Well, he came up to me after he got off the car and told me he was "hurting."

Q. 72. And then what did he do?

A. To the best of my knowledge, he went to the yard office.

Q. 73. Yes. Did you see him laying down there on the ground?

A. No, sir.

Q. 74. Did you see anybody load him onto the motor car?

A. No, sir.

Q. 75. Did you see them carrying him away from there?

A. No, sir.

• • • • • • •

[fol. 1222] Q. 81. Well, what is the custom and practice among the brakemen down there on the yard with reference to keeping a lookout when they are engaged in switching operations such as this?

A. You look in both directions.

Q. 82. Mr. Taylor, you saw that the train was about to couple up to this car and you say you gave the engineer a red board. Did you yell at Still or say anything to him?

A. No, sir.

Q. 83. Why didn't you do that?

A. I didn't think it was necessary.

Q. 84. Why not?

A. I thought he would be looking.

Q. 85. Did you believe that he was in danger at the time?

A. No, sir, I did not.

Q. 86. Mr. Taylor, is there anything unusual on the railroad about the slack running out in trains when you couple up——

A. No, sir.

Q. 87. (Continuing) —and stop?

A. No, sir.

Q. 88. How often does that happen on the railroad that [fol. 1223] the train will stop and the slack will run out?

A. About every time you stop.

* * * * * * *

Cross-examination.

By Mr. Walter G. Burton:

Q. 1. How many cars had been cut off and was ahead of the car that Carl Still was on?

A. I believe one.

* * * * * * *

Q. 5. Let's see if it wasn't Carl Still's duty in taking that car west and placing it on the shop track to watch out for other cars in front of him.

A. As well as behind him, yes, sir.

[fol. 1224] Q. 6. Why did you say that? I didn't ask you anything "behind," but we are going to get to that——

A. All right.

Q. 7. (Continuing) —before you go.

The Court: I thought that was in response to a question, in fairness to this witness.

Mr. Walter G. Burton to the Reporter: You read His Honor the question, and then let's see if that is in response to the question.

The Reporter: (Reading from the record) "Question: Let's see if it wasn't Carl Still's duty in taking that car west and placing it on the shop track to watch out for other cars in front of him. Answer: As well as behind him, yes, sir."

A. (Continuing) I would say, yes, sir.

Q. 8. Yes. Now, you say it was his duty to look in both directions?

A. Yes, sir.

* * * * * * *

[fol. 1225] Q. 11. Well, what necessity—after you throwed a red light on the board and the brakeman on the car who was rolling west in front of the train saw it, why would there be any necessity for his looking back at the train?

A. There is such a thing as a train breaking off, breaking in two.

Q. 12. Oh, yes. How often does a train break in two?

A. Well, I couldn't tell you that.

• • • • • • •

Q. 14. Tell us how often they break in two in these switching operations.

A. There is such a thing as trains uncoupling and breaking in two.

• • • • • • •

[fols. 1226-1227] Q. 17. And you can't tell us when it did happen, can you, in these switching operations?

A. When what happened?

Q. 18. When a train breaks apart in switching operations.

A. I don't remember the dates, no, sir.

Q. 19. Yes. It's not a usual thing for it to happen, is it?

A. Not every day, no, sir.

Q. 20. No. It didn't happen that night, did it?

A. No, sir.

Q. 21. Now, will you admit, Mr. Taylor, that it was your duty as the conductor there in charge over these yard brakemen to see that the west end of that train did not recouple again with cars which had been cut loose and was proceeding west down the track?

A. When I saw there was danger of coupling up, I threw the red board, and that's all I can do.

• • • • • • •

[fol. 1228] Q. 28. I am not asking you what you did. I am asking you what your duty was. Forget what you did.

A. Prevent it from coupling, it was my duty.

Q. 29. To keep it from recoupling?

A. And I did what I could do with it.

• • • • • • •

Q. 32. And you kept a watch out after a car was cut loose from the train to see that it didn't—the train didn't strike it any more?

A. I did what I could do.

Q. 33. And if you kept a watch out and you thought that the train was going to strike a car that had been cut loose and was rolling west, you would throw a red board, wouldn't you?

A. I did throw the red board.

. . . . . .

[fol. 1229] Q. 37. How far was the train at the time from Carl Still's car? That's the west end of the train.

A. I made the statement, from twenty feet to half a car-length.

Q. 38. Now. And you say the train was only moving three or four miles an hour?

A. That's right.

. . . . . .

[fol. 1230] Q. 42. Well, at least you had been eleven years in the switching operations prior to the night Carl Still was hurt?

A. I believe so.

Q. 43. Yes, sir. Now, do you mean to tell this Honorable Court and this jury that as an ordinary and usual proposition you cannot tell them how long it would take a good engineer, using his brakes in a reasonable way, to stop a train with sixty or more cars as that one, you say, had on it moving west?

A. I said no engineer works the same; no engineer brakes the same, and no engine brakes the same.

Q. 44. Yes. And I am asking you in the ordinary and usual course of events, how long would it have taken that engineer, assuming that he was using the brakes in a reasonable and proper way, to stop that train moving three or four miles an hour?

A. I couldn't tell you because I have never run an engine.

. . . . . .

[fol. 1231] Q. 49. Will you tell us how long it usually takes any engineer to stop the westward movement of a train going three or four miles an hour with sixty or more cars?

A. I don't know. I have never timed it.

Q. 50. How much distance, then, will it travel if he applies the brakes, if you give him a red board, going three or four miles an hour?

A. I would say a car-length or two. A car or two.

• • • • • • •

[fols. 1232-1234] Q. 56. And you think it would take him, then, if a car is around thirty-seven feet long—that's a coal hopper—you think it would take him around thirty-seven feet or half of that much distance more to stop?

A. I would say so.

• • • • • • •

[fol. 1235] Q. 75. All right. When you threw the red board, you say that Carl's car was twenty feet away from the west end of the train; that is your best judgment?

A. About that, I wouldn't say exactly twenty.

Q. 76. Well, Carl's car in the ordinary course of events would roll faster than the three or four miles an hour that the west end of the train was rolling?

A. If there was no brake on the car, it should have been in the clear.

Q. 77. What was the matter with Carl's car that it was not rolling?

A. I could not tell you.

• • • • • • •

[fol. 1236] Q. 81. Well, it would roll in the necessary course of events more than three or four miles an hour, wouldn't it?

A. It should have been, yes, sir.

Q. 82. Yes. But it didn't, did it?

A. If it had been, it wouldn't have coupled up to it.

Q. 83. That's right. Now, did the engineer stop like he was supposed to do when you gave him the red light, or did

you give him the red light in time for him to stop before he hit that car?

A. I gave him the red light when I thought he had time to stop and I thought it was necessary to give him the red light.

Q. 84. But you were mistaken. You say the engineer did make a reasonable stop; you say that, don't you?

A. I think so.

* * * * * * *

[fol. 1237] Q. 86. Yes. Will you admit that if the engineer, as you say, did make a reasonable stop when you gave him the red light, that you were not watching the distance between Carl's car and the west end of that train and you didn't give him that light quick enough?

A. I will not say that, no sir.

Q. 87. You won't admit that you didn't give him the light quick enough, will you?

A. I gave him the light when I thought it was necessary.

* * * * * * *

Q. 90. When you thought it was necessary?

A. When I saw it catching up, I threw the red board.

* * * * * * *

[fol. 1238] Q. 95. Tell this Honorable Court and jury, then, why you won't admit that if the engineer made a stop, a reasonable stop, when you gave him the red light, why is it that you say—won't say that you didn't give it to him in time?

A. Have you ever watched one of those boards work?

Q. 96. I am not asking you——

A. You are speaking of the red light. By the time I throw it and the engineer sees it, he has to have time to react.

Q. 97. That's what I am trying to get at. You didn't give him the red light in time for him to react, did you?

A. Yes, I thought I gave it to him in time.

Q. 98. But you now know you didn't give it to him in [fol. 1239] time or the west end of that train would not

have caught up and recoupled and jerked Carl Still's car, would it?

A. I threw it in time to stop.

Q. 99. But he didn't stop, did he?

A. Undoubtedly he didn't. He coupled to it.

• • • • • • •

Q. 101. Well, now, you will admit this, won't you, that it's not usual in your switching operations, because it slows them up and stops them, to let the west end of that train catch up with a car proceeding down the track? That's not usual, is it?

A. We try to avoid it.

Q. 102. Well, I say the reason you try to avoid it is for two reasons: to protect the men on the cars, and, of course, not to slow up the switching operations. Now, that's right, isn't it?

A. That's right.

Q. 103. All right. So it is not usual—will you admit [fol. 1240] that—for this thing that occurred there that night to have happened?

A. It happens all the time.

• • • • • • •

Q. 105. Well, now, you word it the way you want to word it and tell us about it.

A. Just—I have had them to couple to me, if that's what you mean, a many a time.

• • • • • • •

Q. 110. But Harry Manns, standing there where you [fol. 1241] were operating that switch box, could see what was going to happen, couldn't he?

A. So did I. That's why I threw the board red.

• • • • • • •

Q. 115. How do you explain to the Honorable Court and jury if you did throw it quick enough and the engineer performed his duties, and that car was rolling away from the west end of that train twenty feet to a car-length, and that that car is supposed to roll quicker than the train

[fol. 1242] moved west to get away from it, how do you explain to this jury that that train did catch up, recouple, and jerk Carl Still's car?

A. It is possible Carl Still applied a brake to slow that car down he was riding.

Q. 116. So Carl applied a brake?

A. I don't say that. I say it's possible he did.

Q. 117. But you do admit that this car was not rolling away from the west end of that train as it shoud have?

A. It was rolling.

Q. 118. Was it rolling as fast as it should have been rolling?

A. In my opinion?

Q. 119. Yes.

A. I think it was.

. . . . . .

Q. 121. Wait a minute. (Continuing) —because you say it is usual and it is the usual procedure when you cut them out—if this car was rolling as it should have been, why was it, it was necessary for you to throw the red board at all?

A. Because the cars was catching up to Carl, and I [fols. 1243-1245] threw the red board to prevent it from catching up.

Q. 122. It wasn't rolling then properly, was it?

A. I don't know whether he had a brake on it or not.

Q. 123. I am not asking you if he had a brake on it or not. Was his car rolling down there as is ordinary and usual for cars to do in front of that train? They have to get away from it, don't they?

A. I don't believe it was rolling as fast as it should have been rolling.

Q. 124. You don't think it was? So, if he didn't have the brake on, then there was something the matter it wasn't rolling fast enough?

A. I don't know what it was shopped for.

Q. 125. It was shopped?

A. Yes, sir.

Q. 126. And the reason you were putting it on the shop

track, there was something the matter with it, wasn't there?

A. That's exactly right.

• • • • • • •

[fol. 1246] Q. 154. I am going to ask you if you didn't tell Mr. Griffith this—listen now—in substance, this: [fol. 1247] "This jerk caused Carl to be jerked against the east end of his car where he was standing on the brake step, a pretty bad jerk."

A. Now——

• • • • • • •

Q. 157. Pardon me, now. Didn't you tell Mr. Griffith, my partner, in your home on June 9th, 1959, exactly these words, or in substance these words?

A. I don't know whether those are the exact words or not.

Mr. Sanders, Sr., to Mr. Walter G. Burton: May I see the statement?

Mr. Walter G. Burton: Yes; here it is.

A. (Continuing) I don't know whether I told him that or not.

Q. 158. Do you deny you told him that?

[fol. 1248] A. No, I do not.

• • • • • • •

[fol. 1249] Q. 166. You don't think so. All right. You said Carl climbed down off the car and his hip was hurting, he told you?

A. I don't know whether he said his hip, or side, or what. He came to me and he said, "Mope, I'm hurting."

Q. 167. He said, "Mope, I'm hurting." You can remember just exactly?

A. I remember those words; yes, I do.

• • • • • • •

Q. 170. You knew that his car had been struck and recoupled?

A. Thats right.

Q. 171. Did you ask him where he was hurting?
A. I did not.
Q. 172. Did you ask him how he got hurt?
A. No, sir.
Q. 173. You weren't that interested, is that right?
A. I was interested, but the yardmaster takes his [fol. 1250] statement on it. That's the man to report it to.
Q. 174. Did you offer to take him to the hospital?
A. No, sir.
Q. 175. Did you offer to take him to the yardmaster?
A. He was right in front of the yard office.
Q. 176. Did you offer to take him in?
A. I told him to go to the yardmaster.

• • • • • • •

[fol. 1251] Q. 182. And you thought he was hurt?
A. I thought he was hurt. That's the reason I did not make him ride any more cars.
Q. 183. Yes. He didn't ride any more cars that night, did he?
A. To my knowledge, no, sir.
Q. 184. And he never did work any more down there. He came to work, but he didn't work, did he?
A. I couldn't tell you.
Q. 185. Sir?
A. You mean on my job?

• • • • • • •

[fol. 1252] Q. 198. And you saw him on several nights after that, that he came there to work, but didn't work?
A. I don't know whether I saw him several nights or how long, but he was on duty in the west yard; let's put it that way.
Q. 199. You don't know whether he worked or not?
A. He did not ride cars for me, no, sir.

• • • • • • •

[fol. 1253] Q. 204. Now, didn't you tell Mr. Griffith that Carl stayed around, setting around in a motor car or in the shanty the rest of the shift?
A. Did I tell him that?

Q. 205. Yes.

A. I don't know whether I did or not, but he did do that.

Q. 206. "Carl came out to work after that with a stick, but didn't do any work"; did you tell Mr. Griffith that?

A. The best I remember it was a broom stick he was walking with.

• • • • • • •

[fol. 1254] Q. 209. Didn't you tell Mr. Griffith that you saw the train coming back in a westerly manner faster than Carl Still's car was rolling westerly, so you threw a red light on the board to signal the engineer to stop. At that time the last car—I am talking about the west end—was about ten feet from Carl's car?

A. I probably did because I don't know exactly whether it was twenty feet, half a car, or ten feet, or what it was.

• • • • • • •

[fol. 1255] Q. 218. Mr. Taylor, you say you could have hollered at him—Carl Still?

[fol. 1256] A. He was about two cars from me. I could have,

Q. 219. But you didn't?

A. I had no idea the car was going to couple to him.

Q. 220. You threw the red light because you thought it was going to happen?

A. I threw it to prevent it from happening.

Q. 221. Well, you thought it was going to happen if you didn't throw the red light; that's right, isn't it?

A. Yes, sir.

Q. 222. All right. When did you find out that it was going to happen definitely?

A. I didn't find out. That was my own judgment.

• • • • • • •

Q. 226. Well, did you see the train recouple to Carl's car?

A. Yes, sir.

[fol. 1257] Q. 227. Was there a jerk there?

A. I told you there was. The slack ran out of it.

• • • • • • •

Q. 231. Did this recoupling and jerk proposition make any noise?

A. You mean out of the ordinary?

Q. 232. Yes, sir.

A. I don't think so.

Q. 233. You didn't hear any extraordinary noise then?

A. No, sir, I didn't.

• • • • • • •

[fol. 1258] Q. 237. Assuming the engineer had good brakes on the engine; assuming that he did his duty when that red board popped there; let's assume that he did it in a reasonable way; let's assume that he had the string of cars, which you say he had; let's assume that he was backing up about three or four miles an hour, as you say that he was; let's assume that Carl Still's car had been cut loose;——

A. It was cut loose.

Q. 238. (Continuing)—let's assume, as you say, that ordinarily, Carl Still's car did go on down the track in front of that train and not recouple; now, how long, if the engineer did his duty in a reasonable way, would it take him to stop that train in feet?

A. I couldn't tell you.

Q. 239. Three or four miles an hour?

A. I don't know.

Q. 240. Don't you have any idea?

[fol. 1259] A. No, sir, I don't.

• • • • • • •

Q. 243. Well, tell me this, Mr. Taylor: You are there charged with these switching operations; you are supposed to, as you say, protect the west end of that train from these cars that are cut loose to protect the men and to protect the car, and you do not know enough about your job to have any idea, not even to guess, how long it would take a man to—the engineer, if he was performing his duty, to do it with a train going three or four miles an hour, is that right?

A. I have told you that I don't know how long it takes certain engines to stop. All engines don't brake the same.

Q. 244. I have told you that this engine we are talking

about had good brakes on it, the engineer did his job, and you are engaged in those switching operations and can't tell us whether it takes him a hundred feet, ten feet, fifty feet, seventy-five feet, or what to stop?

A. I have never broke an engine. I couldn't tell you how [fol. 1260] long it takes.

Q. 245. We are not talking about you operating an engine. You are right there at the end of those cars and throwed that light hundreds of times—thousands of times—haven't you?

A. I would say I have.

Q. 246. Yes, sir. You have seen the movement of the west end of those trains in switching operations and you have cut off thousands of them haven't you?

A. I believe so.

• • • • • • •

Q. 249. Well, if you guess, you are not charged with that guess. It's just a pure guess.

A. If I would throw the board, whenever I gave it to him, act as quick as I gave him the board, I would say it would stop it in a half a car-length.

[fol. 1261] Q. 250. That would have been twenty feet, is that right?

A. Right close to it.

• • • • • • •

Q. 252. Pardon me. You said that the end of his train at the time you gave him the red board, was twenty feet to a half a car-length away from him?

A. That's right.

Q. 253. Now, remember Carl's car is rolling too.

A. I understand that.

Q. 254. And remember the west end of the train is going three or four miles an hour. Then tell us, if he stopped—if the engineer stopped as he should, why did he catch up all that twenty feet to a half a car-length with Carl's car rolling and didn't stop within the twenty feet or the half a car? Why didn't he do that?

A. I told you I don't know whether Carl had a brake on his car, the car was slowed down, or not. When I saw the

train catching up, I threw the red board. That's all I could do.

Q. 255. But it didn't stop the train?

A. It coupled up.

• • • • • • •

[fol. 1262] Q. 257. When it coupled up, it struck the car?

A. That's right.

• • • • • • •

FRANK J. ALLEN, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

[fol. 1263] A. Frank J. Allen.

• • • • • • •

Q. 4. Who do you work for?

A. N. and W. Railway.

Q. 5. What is your position?

A. Chief clerk for the terminal trainmaster, Bluefield Terminal.

Q. 6. And who is the terminal trainmaster?

A. B. G. Lilly.

Q. 7. How long have you held that position?

A. Since May, 1958.

Q. 8. What did you do before that?

A. I was a clerk in the terminal trainmaster's office. I have been a clerk for the N. and W. Railway since February 15th, 1942.

Q. 9. Mr. Allen, do you know Carl Still, the plaintiff in this case?

A. Yes, sir.

• • • • • • •

[fol. 1264] Q. 11. Did you see Carl Still on July 24th, 1951?

A. Yes, sir.

Q. 12. On what occasion did you see him?

A. I believe that's the day that he filled out his application for employment as yard brakeman.

Q. 13. Where did you see him at that time?

A. At the yard office, N. and W., Bluefield yard.

Q. 14. Did he come to your office?

A. Yes, sir.

Q. 15. Did you give him the form?

A. Yes, sir.

Q. 16. Who filled it out?

A. Yard brakeman Carl Still filled it out.

Q. 17. Did he fill it out entirely?

A. Yes, sir, in its entirety.

Q. 18. Is this the application that I have here, this yellow sheet of paper, which is Defendant's Exhibit No. 4?

A. Yes, sir, that's it.

Q. 19. Now, has any part of that application—is your handwriting on that application?

[fol. 1265] A. Yes, sir, it is, where it's dated at Bluefield, the twenty-fourth day of July, 1951, and my signature is also on the back where it says: "Bluefield, July 24, '51," "Yard Brakeman," and my signature; I wrote all of that.

Q. 20. The remainder of that, was that filled out by Carl Still?

A. Yes, sir.

Q. 21. And did he sign it?

A. Yes, sir.

Q. 22. Mr. Allen, why didn't you fill it out for him?

A. It's the policy that a man making application for employment, he will prepare his own application.

Q. 23. Yes. Were you permitted to fill out the answers to any of these questions for him?

A. No, sir.

Q. 24. Then after he filled out this application, I believe you witnessed it?

A. Yes, sir.

Q. 25. What was done with it then?

A. It was given to him with a note to go to the medical examiner for examination. After his examination, it was placed on his personal file.

Q. 26. Yes. Did you at that time have any reason to

believe that any of the answers to any of the questions in this application were false?

A. No, sir.

[fol. 1266] Q. 27. Did you believe them to be true?

A. Yes, sir.

Q. 28. Did you rely upon the truth of them?

A. Yes, sir, that's—I had to.

Q. 29. Mr. Allen, did you at my request prepare a record, a typewritten record here, showing the time that Carl Still worked for the Norfolk and Western Railway Company from July 24th, 1951, until he marked off injured February, 1958?

A. I did.

Q. 30. Does this—is this the typewritten record that I have here?

A. Yes, sir, it is.

Q. 31. Was that taken from—what records of the Norfolk and Western Railway Company was this typewritten record made from?

A. It was made from the crew cards. That is the card where the crews and extra list is maintained by the timekeeper.

Q. 32. And who has the custody of those cards?

A. They are on file in the terminal trainmaster's office.

Q. 33. And how many of those would there be?

A. There is one daily. There is one made daily for the crews.

Q. 34. For the crews?

[fol. 1267] A. Yes, sir.

. . . . . .

Q. 36. Did you take this information accurately from these records and make up this typewritten record, which I have here?

A. Yes, sir.

. . . . . .

[fol. 1268] Q. 40. You have on this record number of days that could have been worked?

A. That is the number of straight-time shifts that were

[fol. 1269] available for yardman Still.

Q. 41. The number that he could have worked had he wanted to work?

A. That's right, sir.

Q. 42. Then you've got a column here shown, "Number Days Worked"?

A. That's the actual days that he worked.

Q. 43. And then you've got another column over here, "Reason for Absence"?

A. That lists the days that he was absent from duty and the reason therefor.

Q. 44. As shown on the records?

A. As shown on the crew cards.

Q. 45. That you have referred to?

A. Yes, sir.

Q. 46. Now, just by way of classifying this, I observe that here, August, 1951—August, 1951——

Mr. Sanders, Sr., to the Reporter: Strike that.

Q. 47. I believe you show this by months, don't you?

A. Yes, sir.

Q. 48. By months, from July, 1951, until February, 1958?

A. Yes, sir.

Q. 49. Now, I believe you have here, "August, 1951." Under "Number of Days Could Have Worked," "28." And you have under "Number of Days Worked," "28." And then you have under "Reason for Absence," "Off 11th and [fol. 1270] 12th on account of death." Now, how would that be he was off on the eleventh and twelfth and still worked twenty-eight days and twenty-eight days were available? Could you explain that?

A. He doubled two days during that month. He worked sixteen hours during the day in that month.

Q. 50. He doubled?

A. That's right; he was on the extra list and doubled two days.

Q. 51. Then in September, 1951, under "Number of Days Could Have Worked," it shows, "30." Under "Number of Days Worked," it has, "29." But then under "Reason for Absence," it says, "Off by permission Sept. 1, 2 and 3. Called 11:00 PM, 8th, did not report for work, held off Sept. 9th. Off sick 23rd, 24th and 30th." Now, would you explain to the jury how he could have been absent so many times, but still worked twenty-nine days out of thirty days available? Do you see my point?

A. Yes, sir. He doubled, worked sixteen hours on a sufficient number of days to have worked that many days, that many shifts.

Q. 52. I see. Now, under this "Number of Days Could Have Worked," does that apply to his regular shift?

A. That's the number of straight-time shifts that were available to him.

[fol. 1271] Q. 53. Straight-time shifts?

A. Straight-time shifts.

Q. 54. And then, in addition to that, he would work a good deal overtime?

A. Overtime.

Q. 55. And those were extra shifts?

A. Yes, sir.

Q. 56. So, he could have been off for various reasons during the month, but still could have worked an equal number of shifts that were available as shown under "Number of Days Could Have Worked"?

A. Yes, sir.

Q. 57. I believe you have—under "Reason for Absence," you have shown in a good many months, off sick certain days?

A. Yes, sir.

At this point, Mr. Sanders, Sr., showed the work record in question to counsel for the plaintiff.

Mr. Walter G. Burton to Mr. Sanders, Sr.: Were you through?

Mr. Sanders, Sr.: No. I want to offer that as soon as you examine it.

Mr. Walter G. Burton: Yes, sir. Well, we have our objections in to it.

Mr. Sanders, Sr.: All right.

[fol. 1272] Mr. Walter G. Burton: Those objections have been stated.

Mr. Sanders, Sr.: We offer the record, this paper here, as an exhibit, which consists of one, two, three, four, five, six, seven pages.

The Court: It may be introduced.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

The record entitled, "Work Record of Yard Brakeman Carl Still, July 24, 1951 to January 23, 1958," identified

by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 29. 10-12-59. N.V.H."

and is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 58. Mr. Allen, at my request did you also prepare from the payroll records of the Norfolk and Western Railway Company a typewritten statement showing the amount—the gross earnings of Carl Still during the calendar year—during the period—during the calendar year 1955, [fol. 1273] the calendar year 1956, a portion of 1957, and a portion of 1958, being all of the time that Carl Still worked during 1957 and 1958?

A. Yes, sir, I prepared that.

Q. 59. You prepared that. That's a statement consisting of three pages?

A. Yes, sir.

Q. 60. That shows—I believe it shows, for instance, under 1955, it shows his gross earnings for the first half of the month, his gross earnings for the second half of the month, and the total?

A. Yes, sir.

Q. 61. And then you have got a column here listed, "Take Home Pay after Deductions." Are there certain deductions that have—were there certain deductions that had to be made from Carl Still's check before it was turned over to him?

A. Yes, sir.

Q. 62. What were those deductions?

A. Retirement tax, income tax.

Q. 63. Yes. Then what does this column mean, "Take Home Pay after Deductions"?

A. That was the net amount of his check.

Q. 64. The net amount of his check. Now, what records were these taken from?

[fol. 1274] A. That record was taken from certified

copies of the payroll furnished the superintendent of the Pocahontas Division.

• • • • • • •

By Mr. Sanders, Sr. (Continuing):

Q. 65. Mr. Allen, the sheet that I have been referring [fol. 1275] to showing the plaintiff's earnings during the calendar year 1955, the calendar year 1956, and those portions of 1957 and 1958 that he worked, I believe that paper is marked at the top, "Statement of Earnings Yard Brakeman Carl Still January 1955 to January 1958"?

A. That's true.

Q. 66. And where did you—what records did you take this information from shown on this statement?

A. From certified copies of the payrolls furnished by the central timekeeping department at Roanoke, furnished the superintendent of the Pocahontas Division.

Q. 67. And did you prepare this paper yourself?

A. Yes, sir.

Q. 68. And did you prepare this other paper, Defendant's Exhibit 29, yourself?

A. Yes, sir.

• • • • • • •

[fol. 1276] Mr. Sanders, Sr.: We offer this record.

Mr. Walter G. Burton: We object, too, to it.

The Court: With that understanding, it may be introduced in evidence.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

The record entitled, "Statement of Earnings Yard Brakeman Carl Still January 1955 to January 1958," identified by the witness, was thereupon offered in evidence by the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 30. 10-12-59. N.V.H."

and is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

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[fol. 1277] Q. 78. And when an employee wants to mark off on account of sickness, what is the procedure that he has to go through with?

[fol. 1278] A. He calls the timekeeper who has charge of the crew card and marks sick.

Q. 79. Is that all there is to it?

A. That's all there is to it.

Q. 80. Do you question that when they call up and want to mark sick?

A. No, sir, it isn't questioned at all. When a man marks sick, that's it, he's sick.

Q. 81. That's it. If an employee becomes sick or injured or disabled, then do you say that he has a right to go mark up sick?

A. Yes, sir.

Q. 82. And go home and go off the job?

A. Yes, sir.

Q. 83. You were not—were you working for Mr. Lilly when Carl Still says that he was injured?

A. I was working as clerk in the terminal trainmaster's office at that time.

Q. 84. You were not Mr. Lilly's chief clerk?

A. No, sir.

Q. 85. Do you know whether there is a custom and practice on the Railroad that the clerk obtains statements from employees who are injured as soon as those are reported?

A. It is customary to obtain——

[fols. 1279–1291] Q. 86. Yes, sir.

A. Yes, sir, it is.

Q. 87. How long have you known of that custom to exist?

A. Since I have been on the Railroad.

Q. 88. And that's how long?

A. Since February 15th, 1942.

Q. 89. And whose duty is it to get those statements?

A. It is the clerk, or clerk's, of the employing officer, who may be available.

* * * * * * *

[fol. 1292] DANIEL S. DAVIS, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name, please?

A. Daniel S. Davis.

Q. 2. Where do you live, Mr. Davis?

A. 708 Rockbridge Street in Bluefield, West Virginia.

Q. 3. What is your business or occupation?

A. I'm a yard fireman at the Norfolk and Western.

Q. 4. How long have you been a yard fireman at the Norfolk and Western.

A. Approximately eleven and a half years.

Q. 5. Are you working on a steam locomotive or a Diesel?

A. The last night that I performed my duties was on a Diesel.

Q. 6. Mr. Davis, it's in evidence here that Carl Still, a yard brakeman employed by the Norfolk and Western, had an accident down in the west yard on January 23rd, 1958, about twelve-thirty when he was riding a car and was thrown up against the side of the car. Were you the—is it [fol. 1293] your information that you were the fireman on that locomotive that was pushing that train?

A. That is correct, sir.

Q. 7. When did you find out that Carl Still was claiming that he had an accident?

A. It was either the second or the third night after the injury was supposed to have occurred.

Q. 8. Therefore, of course, you don't remember what you were doing at the time the accident occurred or how it happened, do you?

A. No, sir. I had no reason to take notice of anything except that the train and everything was normal movements.

. . . . . .

[fol. 1294] Q. 10. Do you know of anything improper that either you or Mr. Davis, the engineer, did on that occasion?

A. No, sir.

Q. 11. It's in evidence here that just before Carl Still is supposed to have had this accident, the train coupled up to the car that he was riding on, and before that coupling was made, that the conductor gave a red board. Do you remember—if that happened and your engine was on the east end of that sixty-nine cars, would that red board have been visible to you or to the engineer, or to both of you?

A. There are spots on the west yard where it is only visible to one of us at a time, and there is some occasions when it's visible to both of us at the same time.

• • • • • • •

[fol. 1295] Q. 14. You don't know that. Do you know if you were working on that night of January 23rd, as the records indicate you were, did anything unusual occur there which attracted your attention that an accident had occurred?

A. Not a thing, as far as I know, sir.

Q. 15. Any unusual movement of the train that you remember?

A. No, sir.

Q. 16. Mr. Davis, how long have you known A. N. Davis, the engineer on that train?

A. Ever since I have been an employee, sir.

Q. 17. Have you had occasion to observe the manner in which he operates the engines and handles the trains down there?

A Yes, sir.

Q. 18. Do you regard him as a competent and a careful engineer?

[fol. 1296] A. Yes, sir.

• • • • • • •

CECIL C. CANTERBURY, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

. . . . . .

[fols. 1297-1298] Q. 6. When did you become employed by the Norfolk and Western as a yard brakeman, Mr. Canterbury?

A. 1951; the summer of 1951.

. . . . . .

Q. 8. Do you know—did you take an examination, physical examination?

A. Yes, sir.

. . . . . .

Q. 11. Who made the examination?

A. I believe his name is "Troop."

. . . . . .

[fols. 1299-1301] Q. 25. In the waiting room. Then, did you know Carl Still at that time? Do you recognize him? Was he one of the men that was there?

A. Yes, sir. I didn't know him beforehand. I think we all got acquainted at that time, the time we were all hired, I believe.

. . . . . .

[fol. 1302] Cross-examination.

By Mr. Walter W. Burton:

Q. 1. Mr. Canterbury, I understand—I understood you to say that he examined you for about forty-five minutes, is that correct?

A. More or less, yes, sir. It was a pretty good examination. It lasted——

[fols. 1303–1304] Q. 2. You would say it was a thorough examination?

A. I would say it was, yes, sir.

Q. 3. Did he check your back—ask you to bend over and touch the floor?

A. Yes, sir.

• • • • • • •

Q. 6. No, I didn't ask you what he asked. Did he check it? Did he look at it? Did he poke on it and feel it?

A. I believe he did. I am not sure.

Q. 7. Felt your back up and down?

A. I believe so.

• • • • • • •

[fol. 1305] Q. 17. Have you been working with the N. and W. continually since '51, Mr. Canterbury?

A. No, sir.

Q. 18. Well, what happened in the interim there?

A. Well, I was dismissed from service for a while.

• • • • • • •

[fols. 1306–1308] Q. 20. And when were you dismissed?

A. I believe it was July in 1956, I believe.

Q. 21. When did you go back to work?

A. In November in '58.

• • • • • • •

Q. 23. Are you working for them today?

A. Yes, sir.

• • • • • • •

[fols. 1309–1336] By Mr. Walter W. Burton (Continuing):

Q. 41. Have you taken any physical examination since that time, Mr. Canterbury?

A. Yes, sir; I had to take one before I went back to work in November.

• • • • • • •

[fol. 1337] B. G. Lilly, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

The Court to the Witness: What are your initials?
The Witness: B. G.

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?
A. B. G. Lilly.
Q. 2. Where do you live, Mr. Lilly?
A. At Bluefield, West Virginia.
Q. 3. How old are you?
A. Fifty-nine.
Q. 4. Are you married or single?
A. I'm married.
Q. 5. Who do you work for?
A. Norfolk and Western Railway Company.
Q. 6. And what is your position?
A. Terminal Trainmaster.
Q. 7. Terminal Trainmaster at what point?

. . . . . .

A. At Bluefield, West Virginia.
[fol. 1338] Q. 9. What are your duties, briefly—your duties as Terminal Trainmaster?
A. General supervision of the yard operation.

. . . . . .

Q. 11. And you are over what class of employees, Mr. Lilly?
A. Trainmen, clerks, supervisors, and enginemen, and others operating within the yard limits.

. . . . . .

Q. 15. Mr. Lilly, do you know Carl Still, the plaintiff in this case?
A. Yes, sir, I do.
Q. 16. How long have you known him?
A. Since about 1951.

. . . . . .

[fol. 1339] Q. 22. Mr. Lilly, do you remember the time when Carl Still claims that he had an accident down there in the west yard on January 23rd, 1958?

A. Yes, sir. Yes, sir.

Q. 23. Do you remember how you heard about that and when you heard about it?

A. I do.

Q. 24. Tell me how you heard about it and when you heard about it.

A. I first heard about it about six-thirty a.m., January [fol. 1340] 23rd, from what we call a C.T. 37, which is a personal injury report. I then heard R. L. Beavers, who was the night supervisor, give an oral report about seven a.m.

Q. 25. Yes.

A. And then I received an oral report from Carl himself about eight a.m. And then I read a statement from Carl, oh, I'd say ten o'clock in the morning, several hours later.

Q. 26. Yes. Now, you say that Carl Still—you saw him and you got an oral report from Carl Still?

A. First, yes, sir.

Q. 27. Can you be sure about the time of day you got it, Mr. Lilly, or is that just an approximation?

A. It was reasonably close to eight a.m.

Q. 28. Yes. Where did you see Carl Still?

A. I met Carl in my chief clerk's office, which is adjacent to mine.

Q. 29. Who was your chief clerk?

A. W. C. Wilson.

Q. 30. Is he the gentleman that testified on yesterday?

A. Yes, sir.

Q. 31. Do you and Mr. Wilson have the same office, or do you have separate offices?

[fol. 1341] A. Separate offices.

. . . . . .

Q. 33. What did Carl—you say you got an oral report from Carl Still in your office. Will you kindly tell us just what occurred when you saw Carl Still in your office? What was said at the time between you and Carl?

A. As I entered the chief clerk's office through one door, Carl entered through another, and he told me in these

words, "I am not hurt; I am able to do my work." And I asked if there was anything wrong with the equipment which caused the injury. He said there was not. I asked him if he had visited a doctor. He replied, "No." I told Carl if he did go to a doctor, to let me know. Then I told Mr. Wilson to take Carl's statement.

Q. 34. Had that statement already been prepared when Carl came down to your office, Mr. Lilly?

A. Oh, no, sir.

Q. 35. Had you prepared any papers at all for him to sign when he came to your office?

A. No, none whatever.

Q. 36. Did you call Carl Still to come to your office on that morning or have anyone else call him?

[fol. 1342] A. No. Carl came voluntarily.

Q. 37. So far as you know, did anyone on the railroad call him and ask him to come down to your office?

A. As far as I know, no one called Carl to come to the office.

Q. 38. Did he appear to be hurt on that occasion, disabled?

A. No indeed, he did not.

Q. 39. Did he tell you where—did he tell you that he had been thrown against a car or anything of that kind?

A. He did. He did. He said that he had been. His car stopped—after moving about six feet after having been detached from a train, the train coupled, and when the slack ran out, he said that it jerked him up against the end of the car and bruised his left leg and hip.

Q. 40. Yes. Was he complaining of his back at that time?

A. No, no. No.

Q. 41. Did you believe that he was hurt on that occasion—I mean, disabled to the point where he was not able to work, Mr. Lilly?

A. No, I knew from his own statement he was able to work.

[fol. 1343] Q. 42. At least, that's what he told you?

A. That's what he told me.

Q. 43. And did you believe that?

A. I certainly did, yes.

Q. 44. I believe you told me he stated that he was not going to lose any time from work?

A. That's right.

Q. 45. From that, did you believe that he wanted to continue on the job?

A. Why, yes, that's the way brakemen, after a minor injury, are allowed to continue work, by saying that they are able to work.

Q. 46. If a man is hurt and marks off on account of sickness, I believe he is not paid for that?

A. No, he is not paid for being off sick.

Q. 47. For being off sick. But by staying on the job, even though they do do lighter work, they remain on the payroll and get paid for that, is that correct?

A. If he is injured.

Q. 48. Yes. And has it ever happened down there that for that reason, in order to keep a man from losing any time from work when he is injured and still able to get around, that you do let him stay on the job and give him [fol. 1344] some lighter work to do?

A. If he asks for it, I do.

Q. 49. Have you ever, so far as you know, Mr. Lilly, ever permitted a man who was disabled and not able to work, to do anything, to just go out and sit down on the job and draw his pay?

A. No, sir.

Q. 50. Are you permitted to do that?

A. I am not permitted to do that.

Q. 51. Now, in this case did—you asked Carl if he had been to a doctor and what did he say?

A. He said, "No."

Q. 52. And what else did you ask him?

A. I told him that if he did go to a doctor, to let me know.

Q. 53. Yes. Was that about the extent of the conversation?

A. Yes, sir.

Q. 54. Did you tell—at that time did he tell you that he was seriously injured or seriously disabled and not able to work?

A. No. He told me he wasn't hurt and was able to work. [fol. 1345] Q. 55. If he had told you that he was disabled and unable to work, Mr. Lilly, would you have made him—ordered him to go out on the job and remain on the job?

A. No, sir. We don't want injured people, incapacitated, on the property.

Q. 56. And did you order him or direct him to go out there and remain on the job?

A. No, sir.

Q. 57. Did he do that at his own volition and own accord?

A. He did.

Q. 58. Because he wanted to do it?

A. He did.

• • • • • • •

[fol. 1346] Q. 63. But from January 23rd to January 30th, did you know that he was out on the job and was disabled and in a condition where he couldn't work?

A. No, sir. I thought at that time he was performing his [fol. 1347] regular duties.

Q. 64. Did you know that he was not performing his regular duties during that period?

A. I did not.

Q. 65. Did you give him permission to just go out on the job and stay there and not do anything, Mr. Lilly, and draw his time?

A. I did not.

Q. 66. So far as you know, did anybody on the railroad give him permission to do that?

A. That is correct.

Q. 67. And you had no information from any source that he was out on the job, but he was disabled to work and not working?

A. I did not, that's right.

Q. 68. Now, the witness, James Powell Davis, a witness for the plaintiff, has testified that he got a memorandum from your office directing that he should not permit Carl Still to mark off sick or mark off from work without your permission. Do you know anything whatever about such a memorandum?

A. Such a memorandum was not issued.

Q. 69. If Carl Still had wanted to mark off sick, what [fol. 1348] would he have had to do?

A. Carl would have had to call the timekeeper clerk and told him he was sick or injured and he would have been marked off.

Q. 70. To your personal knowledge, has he done that many, many times since July 1951, when he was first employed by the railroad company?

A. He has, many times.

Q. 71. Did he ever come to you personally and ask for your permission to mark off sick?

A. He did not.

Q. 72. Was it customary for any of the men to come to you and ask your permission to mark off sick?

A. Certainly not.

Q. 73. And what was the custom and practice in that regard?

A. The man's word who attempts to mark off sick is the highest authority. All he has to do is call or see our timekeeper and tell him he's sick or injured, and he's marked off without question until such time as he sees fit to mark up again.

Q. 74. So far as you know, Mr. Lilly, in your experience on the railroad, when a man has come in and marked off sick, has it ever been questioned, so far as you personally [fol. 1349] know?

A. He has not.

Q. 75. Does the company check up to find out whether he is sick or not, or take his word for it?

A. Takes a man's word for it.

Q. 76. When he marks off sick, he goes off and comes back and marks up when he wants to, is that correct?

A. That's correct.

Q. 77. And Carl Still could have done that on this occasion?

A. Carl has done that many times and could have on this occasion.

Q. 78. I believe you have said that that memorandum that the witness, Davis, testified to was not issued from your office?

A. It was not.

Q. 79. And you gave no instructions to issue such a memorandum. Do you know anything about such a memorandum having been issued?

A. No, sir, I do not.

Q. 80. And yesterday when the witness testified, was that the first time you had ever heard about that memorandum?

A. That is correct.

[fol. 1350] Q. 81. How many conductors do you have on the east and west yard here in Bluefield, Mr. Lilly?

A. We have about forty-three conductors altogether.

Q. 82. Yes. One of these—you have forty-three conductors?

A. Yes, sir, promoted men.

Q. 83. One of these conductors, a man by the name of Magruder, testified here that on one occasion some of the brakemen made a complaint to him about the manner in which A. N. Davis, the engineer, handled his train. He said that they complained that he was rough and he jerked his train and that they complained about it, and he said he had reported that to a Mr. Kilgore, the assistant yardmaster. Now, do you know Mr. Kilgore, an assistant yardmaster?

A. Yes, sir, we have a messenger boy by the name of G. C. Kilgore.

Q. 84. A messenger boy?

A. Yes, sir—who is training for assistant yardmaster.

Q. 85. I see. He is not an assistant yardmaster?

A. No, sir.

Q. 86. And if Mr. Magruder did make any such report to this Mr. Kilgore, the messenger, did that ever come to your [fol. 1351] attention?

A. It never come to my attention.

Q. 87. And should the report—should it have been made to Mr. Kilgore in the first place?

A. No, sir.

Q. 88. As one in authority?

A. No, sir. It should have been made to someone with experience or to my office.

Q. 89. Yes. Mr. Lilly, how long have you known Mr. A. N. Davis, the engineer in charge of this train?

A. Since—I have known him well since December 1st, 1954, worked more closely with him.

Q. 90. Yes.

A. I knew him prior to that.

Q. 91. Yes. Since that time you have observed the manner in which he operates an engine and train and conducts himself as an employee?

A. That's part of my duties. I do.

Q. 92. Do you regard him as a competent employee?

A. I regard him as a capable employee.

Q. 93. Capable?

A. Yes, sir.

Q. 94. Capable employee?

[fol. 1352] A. Yes, sir.

Q. 95. Do you regard him capable of operating his engine and his trains in a safe and proper manner?

A. I do, and we do, and he does operate his trains in that manner.

Mr. Walter G. Burton: We object to that and move to strike it out.

The Court: Yes, I'll sustain the objection to the last part of that question.

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 96. Does he, so far as you know, operate his trains in a safe and proper manner?

A. He does.

Q. 97. Mr. Lilly, has anybody, any conductor or brakeman or anybody else, any other employees of the railroad company, ever complained to you that Mr. A. N. Davis was an incompetent engineer, that he handled his trains rough, that he jerked his trains or handled them improperly?

A. No, sir. I have received no such complaints.

Q. 98. No such complaints. Do you know of anybody on [fols. 1353–1354] the railroad that has received any such complaints other than possibly Mr. Kilgore, the young man who was a messenger that Mr. Magruder said he complained to?

A. I know of no other, no, sir.

• • • • • • •

By Mr. Sanders, Sr. (Continuing):

Q. 100. Did you, then, ever hear of any such, that complaint, until Mr. Magruder testified?

A. I did not.

Q. 101. And how many other conductors do you say you have over there?

A. Forty-two other conductors.
Q. 102. Forty-two?
A. Yes, sir.

. . . . . .

[fol. 1355] By Mr. Sanders, Sr. (Continuing):

Q. 105. Mr. Lilly, of course, you know nothing about the accident in which Carl Still claims that he was injured, do you?

A. No, sir.

Q. 106. It's in evidence here that at the time Carl Still claims he was injured that a draft of sixty-nine cars was [fol. 1356] pushed in a westerly direction at a speed of about three or four miles an hour; that the last car, the westerly car, was cut off to Carl Still, who had instructions to take it to the shop track. Assuming further that for some reason the car that Still was on slowed up, and the train caught up with it and coupled—— .

Mr. Sanders, Sr., to the Reporter: Read me the whole question to be sure I have all the elements in it.

The Reporter: (Reading from the record) "It's in evidence here that at the time Carl Still claims he was injured that a draft of sixty-nine cars was pushed in a westerly direction at a speed of about three or four miles an hour; that the last car, the westerly car, was cut off to Carl Still, who had instructions to take it to the shop track. Assuming further that for some reason the car that Still was on slowed up, and the train caught up with it and coupled——"

Q. (Continuing)—state whether in your opinion the actual coupling operation would have been a severe impact there.

Mr. Walter G. Burton: Just a minute. Now, Your Honor, we object, and it's obvious he is trying to make an expert witness out of this witness. He hasn't qualified him as an expert. He is trying to testify about something that we [fol. 1357] think is strictly for the jury to determine and not for this witness to say, and we don't think it's proper.

The Court: I'll permit him to answer it based on his railroad experience, and the jury can give it such weight as they feel it entitled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

Mr. Sanders, Sr., to the Witness: You may answer it.

A. The actual coupling was a very normal thing, and inasmuch as the car and the draft of cars were both moving in the same direction with the draft being shoved by the engine slightly faster, the coupling would have been of no significance whatsoever.

Mr. Walter G. Burton: Now, just a minute. Now, we move to strike that answer and instruct the jury not to consider it. He is testifying as to a fact of that coupling. He didn't see it and he wasn't there.

The Court: He said it was—what was the first part of the answer?

Mr. Sanders, Sr.: We think the first part was objectionable.

The Court: Yes, sir, the first part was objectionable. [fol. 1358] He states that—well, it was a normal coupling. He couldn't know that, and I instruct the jury not to consider that part of the answer.

By Mr. Sanders, Sr. (Continuing):

Q. 107. But, Mr. Lilly, now, assuming the truth of that hypothetical question that I put to you, in your opinion, would this have been a heavy impact when the cars coupled?

Mr. Walter G. Burton: Objection.

A. It would not.

• • • • • • • •

By Mr. Sanders, Sr. (Continuing):

Q. 108. In your opinion, what kind of an impact would it have been under those circumstances?

• • • • • • • •

[fol. 1359] A. It would have been a normal impact.

Q. 109. Mr. Lilly, do you require on the railroad that brakemen get off of cars before the trains couple up to them?

A. No, sir.

Q. 110. What is the custom and practice as to the brakemen remaining on cars or drafts of cars when the train couples up to the car or the draft?

A. The practice is for the brakeman to remain on the car or draft while the coupling is made.

Q. 111. Do you have any rule or custom on the railroad with reference to the maximum speed which a train can travel coupling—can travel when intending to couple up to a standing car? Do you understand my question?

A. We do have.

. . . . . .

[fol. 1360] Q. 112. What is that?

A. Four miles per hour.

. . . . . .

Q. 113. Four miles an hour. Do you mean that your rules will permit a train to couple up with a standing car while the train is moving at a speed of four miles an hour?

A. That is correct.

. . . . . .

[fol. 1361] Q. 114. And in such situations, do your rules require the brakeman to get off of the car or the draft that it is being coupled up to?

A. The brakeman is not required to get off.

Q. 115. Does it ever happen on the railroad that sometimes a draft of cars in a situation that I described to you a few minutes ago will couple up to a car after that car has been cut off?

Mr. Walter G. Burton: Objection.

Q. (Continuing) Does that ever happen?

A. Frequently.

. . . . . .

[fol. 1362] Q. 117. Is that anything unusual for a train to—after a car has been cut off from it, to catch up with the car and couple to that car again?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. Nothing unusual whatsoever.

• • • • • • •

[fols. 1363–1365] Q. 119. Mr. Lilly, have you ever heard of a brakeman being injured in a coupling operation in which the train has caught up with the car and coupled up to the car——

A. No, I have never heard of one being injured that way.

Q. (Continuing)—prior to the time this accident happened?

• • • • • • •

Mr. Sanders, Sr.: My question was, prior to Carl Still's accident.

• • • • • • •

Q. 125. Are the brakemen instructed—do they receive any instructions when they are employed and trained with [fol. 1366] reference to keeping a lookout when they are engaged in switching operations?

A. They are.

Q. 126. What instructions are given them in that regard?

Mr. Walter G. Burton: We object to that. We want to know what instructions he gave Carl Still. It might be proper if you show that, but it is not proper if you show what they gave to somebody else.

• • • • • • •

A. We try to impress on our employees the importance of looking in both directions at all times, and, in particular, following cars or drafts of cars which might overtake them.

• • • • • • •

By Mr. Sanders, Sr. (Continuing):

Q. 127. Mr. Lilly, why is it important that an employee shall keep watch in both directions?

• • • • • • •

[fol. 1367] A. The speeds of the cars vary, and the manner in which a brakeman controls his car might be slower than the man behind him. Therefore, one brakeman could overtake another. A draft of cars could break off and overtake the rider.

. . . . . .

[fol. 1368] Q. 137. Mr. Lilly, during the time that Carl Still worked for the Railroad Company, from 1951 until he marked off in February, 1958, did you know that he had anything wrong with him, any physical defect about him, that would not qualify him for work as a yard brakeman?

A. No, sir, I didn't.

. . . . . .

[fol. 1369] Q. 139. Did you believe that Carl Still was physically fit and proper to serve as an employee of the Railway Company during the time he worked under your supervision?

A. I did, yes, sir.

Q. 140. And did you know—if he did, did you know that he made any false representations in his application or to Dr. Troup, the medical examiner, in order to obtain employment?

A. No, I didn't know that.

. . . . . .

[fol. 1370] Q. 143. Later what was done about that? I mean, don't tell me why it was done or go into the details. Just tell me what was done.

A. After he was dismissed his organization handled the matter with——

Mr. Walter W. Burton: Objection.

The Court: Yes, don't go into——

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 144. Well, what——

A. He was reinstated.

Q. 145. He was reinstated by the Railroad Company and with his seniority rights unimpaired?

A. Seniority rights unimpaired, that's right.

Q. 146. So that his seniority rights at the time he was injured dated from July 24th, 1951?

A. That is right.

Q. 147. The date of his employment?

A. That's right.

* * * * * * *

[fols. 1371-1380] Cross-examination.

By Mr. Walter G. Burton:

* * * * * * *

[fols. 1381-1388] Q. 62. Now, didn't he go immediately when he left your offices to Dr. Troup's office, and didn't Carl Still call you from Dr. Troup's office and tell you that Dr. Troup said that he ought to go to the Sanitarium Clinic?

A. I don't know whether Carl went to Dr. Troup's office or not, but he did not call me.

Q. 63. Now, you deny to this Honorable Court and this jury that Carl Still went to Dr. Troup's office; Dr. Troup called you on the phone himself, and, when he got you, he turned it over to Carl Still, and Carl Still talked to you and told you that Dr. Troup had told him to go to the Sanitarium Clinic? You deny that to this jury?

A. I deny knowing whether Carl went to Dr. Troup or not, I don't know if he did, and I deny that Carl or Dr. Troup either one called me for any reason whatsoever pertaining to the injury.

* * * * * * *

[fol. 1389] Q. 102. Now, Mr. Beavers reported to you that he went up there afterwards and found this man in the shanty about six o'clock one morning and he wasn't working, and he asked him what he was doing not working, and Carl just politely walked off and down over the hill and left; did Mr. Beavers report that to you?

A. Mr. Beavers told me on January 31st that in the west yard he had found Carl not performing his work, and he

told Carl to either go to work or to go home, and that Carl went home.

Q. 103. What did you do about that?

A. Not a thing.

Q. 104. You knew the reason you didn't do anything about it, that you told him to go up there and not mark off, and that you would pay him for it; isn't that a fact?

[fols. 1390–1392] A. That is absolutely not a fact. When Still did what his supervisor told him to do, he carried out his instructions. There was no rule violation.

• • • • • • •

[fol. 1393] Q. 125. Well, will you say, then, that he did in the five years and four months and one week that he [fol. 1394] worked for your company, the period July 24th, 1951, to the morning of February 2nd, 1958, that he was an efficient, competent brakesman?

A. We thought so.

Q. 126. And you had no complaints whatsoever about his work.

A. None.

Q. 127. As a brakesman?

A. That's right.

Q. 128. He was physically able to do it, is that right?

A. He did his work.

Q. 129. Yes, and he did it and he performed it well, didn't he?

A. He did a good job of it.

Mr. Walter G. Burton: Bear with me, please, Your Honor, just a minute.

Thereupon, Mr. Walter G. Burton and Mr. Walter W. Burton conferred together briefly.

By Mr. Walter G. Burton (Continuing):

Q. 130. Now, Mr. Lilly, isn't it the practice, and the usual practice, of your office to not make any reports of accidents where they are minor?

A. We report all accidents, minor or major.

Q. 131. Why didn't you report this one?

[fols. 1395–1397] A. This injury and accident was properly reported.

• • • • • • •

[fol. 1398] Q. 149. Don't you believe, Mr. Lilly, in your position as an official of this Railroad Company, that an engineer ought to have some idea as to what's happening to the west end of the train when he's operating the engine on the east end of the train forty to sixty cars away? Don't you think he ought to know what happens when he puts the brakes on fast, puts them on slow, starts up slow, or stops [fols. 1399–1405] slow, or backs up? Don't you think he ought to know that?

A. He does know.

Q. 150. He does?

A. Yes.

Q. 151. And if he says he doesn't——

A. He doesn't know about the classifying of the train, but he does know about stopping because he is the individual that stops.

Q. 152. Sure; and he knows about what the west end of that train will do, too, doesn't he, when he is on the east end of it?

A. I think so.

* * * * * * *

[fol. 1406] FRANK J. ALLEN, a witness heretofore introduced on behalf of the defendant, being recalled for further examination, testified as follows:

Cross-examination.

By Mr. Walter W. Burton:

* * * * * * *

Q. 3. Now, Mr. Allen, referring to Defendant's Exhibit No. 29, so that you will know what I am talking about here——

A. Yes, sir.

Q. 4. (Continuing)—I think you have here a sheet, which is entitled, "Work Record of Yard Brakeman Carl Still," is that correct?

[fols. 1406½–1407] A. That's correct.

Q. 5. Now, on this sheet, you have it broken down into the different months that Carl Still worked?

A. That is true.

. . . . . .

[fol. 1408] Q. 21. So that all the entries in the fourth column are not copied from any record. They are a combination—by reading the card, you interpret what that card says and put this in here?

A. Absolutely, yes, sir.

Q. 22. All right, sir. And I think you could say that about each and every one of the entries found in the column, couldn't you?

A. Yes, sir, that's true. That's——

. . . . . .

[fol. 1409] Q. 28. So, in other words, you interpreted all these records to arrive at what's found on this sheet?

A. I had to read the records, yes, sir. I had to know what was on the records.

. . . . . .

[fols. 1410–1411] Q. 31. Now, Mr. Allen, referring to Defendant's Exhibit No. 30, what is that, please, sir?

A. That's an earnings record taken from the payrolls for 1955 to '58.

Q. 32. Now, Mr. Allen, isn't it a fair statement to say that this also is a combination of the earning sheets by which you have omitted some material found on that earning sheet and you have combined other material?

A. His miscellaneous deductions, such as retirement and income tax, has been omitted from that. It just shows the gross amount and then the net amount.

. . . . . .

[fol. 1412] Q. 45. Now, again referring to a brakesman marking off, Mr. Allen, what reasons can he give to mark off?

A. They give various reasons. If there are sufficient men to fill the crews, he can mark off by permission. They do mark off by permission. It depends on who marks the

card, Mr. Burton. If they call and want off on account of death or a funeral, a lot of times they will place that on the card; and a lot of times they will mark it permission; and then a man will call and mark sick.

Q. 46. Even though he is not sick?

A. That has happened, I think.

Q. 47. And that is a custom, too, isn't it?

A. What is that?

Q. 48. For brakesmen to call in and mark off sick even though they have not been sick, if that's the only way they can mark off?

A. That has happened, yes, sir.

* * * * * * *

[fol. 1413] IN CHAMBERS

COLLOQUY

The Court: It is my recollection that Exhibit 29 is admitted as being a complete work sheet made from—and a true copy of the crew cards. Mr. Allen now states that the fourth column is considerably based on his interpretation. [fol. 1414] If this motion is made, I think it should be only as to the fourth column; but I'll hear you gentlemen in regard to an interpretation. If the records are here, I take it they have the right to cross-examine him and bring out those points on the interpretations.

Mr. Sanders, Sr.: Your Honor, he uses the word "interpretation," but every bit of the information that he put in the fourth column he took from the books. Now, it doesn't have to be in the precise words that's in the books. It would be an impossibility almost to do that in making up an exhibit.

Now, I know the custom and the practice in the years that I have been practicing law—and I have been in many cases—for instance, where an accountant testifies in a case, and Your Honor has had many of those cases, where the accountant, instead of producing all these voluminous books and records, is permitted to bring in schedules of what he finds on the books, and prepares schedules and puts in there, and testifies from those records.

Suppose that Mr. Allen—we have a right to show this

information—now, just suppose that we had to sit down here for the length of time that it took Mr. Allen to go through each one of these books and bring this matter out before the jury; why, Your Honor, we would be here— [fol. 1415] not only it took him two weeks; I would say it would take us a month or longer to bring that out. And it is a matter of convenience to the Court and Jury.

Now, if the gentlemen can point out anything that is substantially wrong with the figures on this exhibit in the fourth column, or any place else, that's one thing; but if all they can point out is just a little bit of difference in the wording and no difference in the substance, why, then, I can't see where that this motion has any merit at all.

I have seen this done in many, many cases. I have never seen it objected to where the books and records are produced. We can go through the books and records and take the time to bring this out, but I think that would be a terrific imposition on this Court and this jury and counsel and everybody else when they have had an opportunity to go over these books last evening, and the books are still here, and point out to this jury if there is anything on there that is substantially wrong.

I don't think the motion has the slightest merit, not the slightest, and I object to it.

The Court: Well, I believe the jury has gotten the explanation of the matter, and I'll overrule the motion to strike.

* * * * * * *

[fol. 1416] Re-direct examination.

By Mr. Sanders, Sr.:

Q. 1. Mr. Allen, you say it took you about two weeks to compile this information?

A. Yes, sir; that's approximately.

Q. 2. And at Mr. Burton's request did you bring all the books and records of the Railroad Company over here yesterday from which you took this information?

A. Yes, sir.

Q. 3. And last evening did you stay here after court [fol. 1417] with young Mr. Burton and go over these items,

item by item, and point out to him where you got this information and give him all the information you could?

A. Those which he asked about, Mr. Sanders.

• • • • • • •

Q. 5. And he has had free access to those books and records?

A. Yes, sir. They were here yesterday afternoon.

• • • • • • •

[fol. 1418] Dr. Harold E. Troup, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

• • • • • • •

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name, please?

A. Harold E. Troup.

Q. 2. Where do you live, Dr. Troup?

A. In Bluefield.

Q. 3. How old are you?

A. I am fifty-two.

Q. 4. Married or single?

A. Married.

Q. 5. What is your business or occupation, Dr. Troup?

A. I'm a physician, Doctor of Medicine.

[fol. 1419] Q. 6. Are you a graduate of a medical school?

A. I am a graduate of the University of Louisville.

Q. 7. Louisville, Kentucky?

A. Louisville, Kentucky.

Q. 8. And when did you graduate?

A. In the year of 1935.

Q. 9. Following that, did you have any training as an intern, doctor, or any postgraduate work?

A. I interned for one year at the Norton Memorial Infirmary in Louisville.

Q. 10. Then what did you do?

A. I went to practice in Henry County, Kentucky.

Q. 11. How long did you practice down in Henry County, Kentucky?

A. Three years.

Q. 12. What did you do then?

A. I went with the Veterans Administration.

Q. 13. You went with the Veterans Administration?

A. Yes.

Q. 14. In what capacity?

A. As, first, an associate medical officer.

Q. 15. And then what——

A. Later I was promoted to medical officer.

Q. 16. And what branch of medicine did you do in the Veterans Administration—general practice or did you specialize?

[fol. 1420] A. In the Veterans Administration I was given the first year training in neuropsychiatry.

Q. 17. Neuropsychiatry?

A. Yes.

Q. 18. What is neuropsychiatry?

A. It's the practice of medicine involving the diseases of the nervous system and also of mental diseases.

Q. 19. How long were you with the Veterans Administration?

A. I was with the Veterans Administration for approximately five years.

Q. 20. And then what did you do?

A. Then I went to the State Hospital at Lexington, Kentucky.

Q. 21. And what kind of work did you do——

A. I was a staff physician. That is a mental hospital.

Q. 22. And how long were you there, doctor?

A. I was there approximately five months; and then I went—left there.

Q. 23. And where did you go then?

A. I come to McDowell County at Caretta where I did industrial medicine.

Q. 24. Was that with the Consolidation Coal Company?

A. No, that was when Carter Coal Company operated it.

[fol. 1421] Q. 25. Carter Coal Company at Caretta?

A. Over at Caretta.

Q. 26. And when did you go with the Norfolk and Western, doctor?

A. In 1948, January 16th.

Q. 27. You were employed in 1948 as medical examiner for the Norfolk and Western?

A. Assistant medical examiner.

Q. 28. Assistant. And where were you located first?

A. Portsmouth, Ohio.

Q. 29. And then did you later move to Bluefield?

A. I was transferred to Bluefield and promoted to medical examiner.

Q. 30. And how long have you been working as medical examiner for the Railroad Company at Bluefield?

A. Since March 1st, 1949.

Q. 31. Dr. Troup, do you know Carl Still, the plaintiff in this case?

A. I do.

Q. 32. When did you first become acquainted with Carl Still, as far as you know?

A. Well, I don't remember the first time, but I do know that I examined him for a position in 1951. That was checked on our records.

Q. 33. I see. Doctor, is it customary for you to examine the men that apply for employment on the Norfolk and [fol. 1422] Western Railway Company?

A. Yes.

Q. 34. Why do you do that?

A. That is prescribed by the Company.

Q. 35. As a Company rule?

A. They are Company rules.

Q. 36. Do you give various men—I mean different men different examinations, or do you give them all the same examination, Dr. Troup?

A. They are given different examinations depending upon the position which they are applying for.

Q. 37. I see. Now, Carl Still—what position did he apply for, doctor?

A. Yard brakeman.

Q. 38. And what kind of an examination does that require for a yard brakeman?

A. Well, the—we are required first to examine their eyes. If they do not meet the visual and color vision require-

ments, we terminate the examination at that point. Then we proceed with the physical examination and other examinations we deem necessary. That is my responsibility to determine that.

Q. 39. Now, doctor, are your physical qualifications different on the Railroad for different positions?

A. They are.

Q. 40. Well—or why do your physical qualifications vary [fol. 1423] according to the position for which the man is applying?

A. The type of work the man does determines that. If he does hard work, we are much tighter on him than if he does clerical work, or sedentary occupations. We allow certain facts in one classification we do not in another.

Q. 41. What about the physical qualifications for a man applying for a position as a yard brakeman?

A. They are the highest we have.

Q. 42. They are the highest. Dr. Troup, it is customary for you to keep records and has it been customary for you to keep records of the men that you examine for employment on the Railroad since you have been in Bluefield?

A. The only records we keep is a certificate - we keep the duplicate carbon copy of a little form that is placed on the application when we approve or disapprove the man.

Q. 43. Do you—I hand you two books here, paper-back books, and ask you what those are.

A. These are the duplicates of the records which we make and attach to the application that the man hands us, which states on it whether or not we have approved or disapproved him. We pin that on the yellow application.

Q. 44. Is it customary when a man is applying to the Railroad Company for employment to fill out, sign, and bring to your office a yellow application?

[fol. 1424] A. Yes.

Q. 45. And was that done in this case?

A. To the best of my knowledge, it was.

Q. 46. I hand you, doctor, a yellow sheet of paper marked, "Defendant's Exhibit No. 4," purporting to be an application for employment by Carl Still as a yard brakeman for the Norfolk and Western, dated July 24th, 1951, and ask you to state whether, so far as you know, that is the application that Carl Still brought to your office.

A. As far as I know, it is.

Q. 47. Yes. Doctor, do you have any records, then, in your possession there in these two books showing that you did examine Carl Still on July 24th, 1951, and whether you also examined any other men on that same date?

A. This is dated July 25th.

Q. 48. Now, what is?

A. The record. And——

Q. 49. Is that the record in one of these books?

A. That's in this book.

Q. 50. I believe you said that when you would examine a man you would fill out a slip——

A. That's——

Q. 51. (Continuing)—and send that to someone attached to the application?

A. Yes, sir.

Q. 52. You mark on it, "Approved"?

[fol. 1425] A. Or "Disapproved."

Q. 53. And you would keep a copy of that?

A. That is this copy.

Q. 54. And the copies that you kept are in these two books, is that right?

A. That's right.

Q. 55. Are those your permanent records?

A. They're my permanent records.

Q. 56. And you have kept those ever since?

A. Yes.

Q. 57. If you would read for us—tell us from those permanent records there if you examined any other applicants for employment with the Norfolk and Western on this same date, and, if so, give the names of the applicants, the employment that they applied for, the date that you examined them, and any other information that appears on there. Take them one by one.

A. All right. On July 25th, 1951, I addressed a slip to R. F. Berry, the Terminal Trainmaster, at Bluefield, West Virginia, on one Paul A. Mitchell. He was examined for a yard brakeman on the Pocahontas Division in the CT Department, which is the abbreviation for Conducting Transportation. He was approved.

On July 25th, 1951, I addressed another slip to R. F. Berry, Terminal Trainmaster, Bluefield, West Virginia, on Carl Still. He applied for yard brakeman on the Poca-

[fol. 1426] hontas Division in the Conducting Transportation Department and was approved.

On July 25th, 1951, I addressed another slip to R. F. Berry, Terminal Trainmaster, Bluefield, West Virginia, on one Cecil Clyde Canterbury. He applied for a yard brakeman on the Pocahontas Division in the Conducting Transportation Department, and he was approved.

On July 25th, 1951, I addressed a slip to T. L. Brown, Master Mechanic, Bluefield, West Virginia, on one Cecil H. Belcher. He was employed as a helper car repairman on the Pocahontas Division, Motive Power Department, and he was approved.

On July 25th, 1957, I addressed a slip to Otis—O. E. Mullins,——

Q. 58. Doctor, did you say 1957?

A. 1951. I beg your pardon. That's a mistake. I am reading. My slip says '51. (Continuing)—Bluefield, West Virginia, on an Ernest S. Brown. He was employed as a brakeman on the Pocahontas Division, Conducting Transportation Department. He was approved.

On July 25th, 1951, I addressed a similar slip to F. R. Litz, Road Foreman of Engines, Bluefield, West Virginia, on Ralph L. Stout, and he was employed as a fireman on the Pocahontas Division, Conducting Transportation Department.

And that is all the record indicates for July 25th, 1951.

[fol. 1427] Mr. Sanders, Sr., to Counsel for the Plaintiff: Do you want to see these?

Mr. Walter G. Burton: No.

By Mr. Sanders, Sr. (Continuing):

Q. 59. Doctor, on July 25th, 1951, did you fill out a paper which is—which you took from this book showing that you had examined Carl Still——

A. My records indicate that.

Q. 60. (Continuing)—and then approved him?

A. That is my writing. That is the slip.

Q. 61. What does that slip show?

A. That shows that I addressed—on July 25th, 1951, I addressed to R. F. Berry, Terminal Trainmaster, at Bluefield, a slip on Carl Still, occupation, yard brakeman, on the

Pocahontas Division of the CT Department, which is Conducting Transportation, and I approved him.

Mr. Sanders, Sr.: Yes.

At this point, Mr. Sanders, Sr., offered the slip in question to counsel for the plaintiff for their examination; however, counsel for the plaintiff declined to examine said slip.

Mr. Sanders, Sr.: We offer this in evidence, Your Honor.

[fol. 1428] The Court: Let it be introduced.

The slip, identified by the witness, was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 31. 10-13-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearing in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 62. Doctor, do you have any personal recollection of making this examination of Carl Still or these other men?

A. Not that far back. I don't know how I could have, and I wouldn't try to remember it.

Q. 63. Do you have anything other than your records here to go on?

A. Only the records that you have shown me.

Q. 64. Yes. Now, doctor, I hand you what—Defendant's Exhibit No. 5, which purports to be "Physical Examination for Employment" of Carl Still and ask you if you—if that is the—according to your records, if that is the record of the examination that you made of Carl Still which you have just certified about.

A. That is. That is in my handwriting, a great deal of it.

[fol. 1429] Q. 65. Now, this record here, doctor, I call your attention it is dated at the bottom on the typewriter July 24th, 1951, which is one day prior to the date that your slip was filled out and that your record was made here. Do you have any explanation for that?

A. Yes, sir.

Q. 66. What is the explanation?

A. At that time I was being crowded; I had more than I

could do; and as applicants come in, my clerk would fill out this card and we would give them an appointment to return on the day that I thought I could take care of them. We did not try to keep them waiting around the office. We had a limited space in the waiting room.

Q. 67. Yes.

A. And that's why that happened.

Q. 68. Now, doctor, you say you filled out this card that I refer to in your own handwriting—this card?

A. Yes, sir, that's my handwriting—the back of it, except the typed part.

Q. 69. That's on the back under "Medical Examiner's Certificate"?

A. Yes, uh-huh.

Q. 70. You say all of that handwriting on there is your handwriting?

A. Is my handwriting.

[fol. 1430] Q. 71. I believe the date is typed on there on——

A. The date on the slip is the day I approved him. I may have started the examination and not finished until the next day, but the date I decided to approve him is the date on that slip.

Q. 72. Then, doctor, the typewriting that's on the top of this card up here, who put that in there? Who usually and customarily wrote that in?

A. My clerk. That's identifying data. My clerk types that before I see the man usually.

Q. 73. What was your custom and practice, doctor, as to the manner in which you examined these men? Did you have one of them come to your office at a time or how did you do that?

A. I take one at a time in the examining room.

Q. 74. Well, would you examine more than one man or one person each day?

A. Yes.

Q. 75. Usually. How many men would you usually examine a day, if there was any average?

A. Five or six.

Q. 76. Five or six. Would those men make appointments at different times in the day and come to your office, or would they come to your office at the same time and wait until you could get to them?

A. The men come as they are sent by the employing [fol. 1431] officer, and they then wait until I can get to them.

Q. 77. Yes. Where do they wait?

A. In a waiting room in the office.

Q. 78. And, then, do you have a separate office?

A. Yes.

Q. 79. Now, was it and is it now customary for you to examine—to take these men in the room and examine all of them at the same time?

A. No, we never do that.

Q. 80. Are you permitted to do that by the Company rules?

A. No, I am not.

Q. 81. What is your method, doctor, of making the examination, your usual and customary method of making the examination?

A. My customary method is to examine the eyes first, because in a brakeman or fireman it is important that their vision is correct; and if it is not correct—does not meet the standards—we terminate the examination at that point.

Q. 82. Well, do you take—what do you do generally when you take the man in your room?

A. Well, after I examine their vision, I disrobe them. I strip them down to the waist first; examine their heart and lungs and examine their skin, and anything that—any other examination that I deem necessary, I do.

[fol. 1432] Q. 83. Did you take X-rays of these men at the time?

A. At that time we did not.

Q. 84. Were these examinations that you gave, doctor, thorough and complete medical examinations that you gave there?

A. They are termed what is called "screening" examinations.

Q. 85. Screening examinations?

A. Yes; that's pre-employment, which is essentially a screening examination.

Q. 86. That's right. And you say you would strip the men, strip them down to the waist, and then drop their trousers, and then in a general way what examination would you make?

A. We would look at their skin and the skin of their legs; we would look for hernia, and the genitals, and anything of that nature that would cause us trouble later on.

Q. 87. Did you ever take their shoes off?

A. Yes.

Q. 88. When would you take their shoes off?

A. When we felt there was a defect of the legs or anything we wanted to see or we got a history of it.

Q. 89. And you say that the brakemen, that was the—the brakemen had the highest physical requirements for employment?

A. That is correct.

[fol. 1433] Q. 90. Now, did you also, doctor—was it usual and customary at the time this examination was made to obtain a medical history, past history, of the applicants for employment?

A. Yes, sir.

Q. 91. Was that required?

A. That is required.

Q. 92. Did you have some white cards similar to the card that I hold here, which had been prepared by the Railroad Company——

A. I do have.

Q. 93. (Continuing)—which you were required to use in taking the history?

A. Yes, sir.

Q. 94. And did that contain questions and answers?

A. Yes, sir.

Q. 95. Yes, sir. Doctor, I realize that you don't have any independent recollection of making this examination and all that you have to go on is the records which you have produced here in court;——

A. That's right.

Q. 96. (Continuing)—but would you say that you followed your usual custom and practice at the time in examining all of these men that you examined on this particular date?

A. I did.

Mr. Walter G. Burton: Objection.

[fol. 1434] The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

Mr. Walter G. Burton: Move to strike the answer.
The Court: Overruled.
To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 97. Did you have any reason, so far as you now know, to depart from that practice?

Mr. Walter G. Burton: Objection.
The Court: Overruled.
To which action and ruling of the Court the plaintiff by counsel, at the time accepted.

A. No, sir.

Q. 98. Do you ever vary from that practice?

Mr. Walter G. Burton: Move to strike the answer.

A. No, sir.

The Court: Overruled.
To which action and ruling of the Court the plaintiff, by [fol. 1435] counsel, at the time excepted.
Mr. Walter G. Burton: Same objection.
The Court: Overruled.
To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 99. Do you then believe that you asked Carl Still the questions appearing on this application and recorded on there the answers that he gave to you?

Mr. Walter G. Burton: We object.
The Court: Overruled.
To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. I asked the questions in the order listed on that card and recorded the answers as they were given me.

Mr. Walter G. Burton: Move to strike the answer.
The Court: Overruled.
To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

[fol. 1436] By Mr. Sanders, Sr. (Continuing):

Q. 100. I believe you approved him?

A. I did.

Q. 101. And you attached the little notice that you have introduced in evidence here?

A. I did.

Q. 102. This little notice dated July 25, 1951, you showed your approval on that, attached it to the application, and gave it to Carl Still?

A. I did.

Q. 103. And he took it where?

A. Well, he was instructed to take it where he got it—to the terminal trainmaster's office.

Q. 104. Yes. And he then was employed?

A. Well, as far as I know.

Q. 105. Now, doctor, at the time you examined Carl Still your record here shows that you asked this question: "Have you ever had rheumatism?" The answer is: "No." Doctor, if you had been told by Carl Still at that examination that prior to 1945 he had been afflicted with rheumatism in his back, his arms, and legs to such an extent that he was confined to the bed for several months, and that he had complained about that condition in the Army, would you have approved him for employment?

A. I would not have.

[fol. 1437] Q. 106. Why not?

A. I would have been afraid that we would have subsequent troubles with that disability for which we would have been liable.

Q. 107. Yes. Doctor, another question which appears on this application says—the question: "Have you ever had a medical discharge from the military service?" The answer is: "No (Honorable)." If you would have been told by Carl Still at that time that he had a medical or disability discharge from the United States Army which he received in 1946, and that the basis of that medical discharge had been a low back disability, would you have approved him for employment with the Railroad Company?

A. I would have disapproved him.

Q. 108. Doctor, if Carl Still had told you that following his medical or disability discharge from the Army in 1946, and he applied to the Veterans Administration for a pen-

sion on account of a low back disability, and possibly other ailments, and that he had received that disability pension and collected it for a considerable period of time, would you have approved him for employment?

A. I would have disapproved him for a yard brakeman.

Q. 109. Now, this application also asks this question: "Have you ever had a long or serious illness?" And the answer is recorded as: "No." If you had known—if he [fol. 1438] had told you at that time that he had been afflicted with rheumtism prior to 1945 which affected his low back and his joints in his back, his arms, and his legs, and that that had bothered him in the Army, would you have approved this application?

A. I would have disapproved it.

Q. 110. Now, doctor, another question here is this: "What injuries have you ever received?" And the answer is recorded as: "No." If you had known—if Carl Still had told you that in the year 1941 or 1942 that he had been involved in an automobile accident and injured his back, and that his back had been giving him trouble for several years following that automobile accident, would you have approved him for employment?

A. I would have——

Mr. Walter G. Burton: We object because there is no foundation, basis, for the question, we don't think.

Mr. Sanders, Sr.: The Veterans Administration records show that that's the information that he gave to the Veterans Administration and the Army doctors.

The Court: Overruled.

Mr. Walter G. Burton: We object to this. We objected to what those records contain except as to what Carl Still himself filled in personally.

[fol. 1439] Mr. Sanders, Sr.: Your Honor has admitted the records.

Mr. Walter G. Burton: So we want to object to this. If we didn't, we wouldn't even be consistent.

The Court: Overruled.

To which action and ruling of the Court and plaintiff, by counsel, at the time excepted.

A. I would have disapproved him.

Q. 111. Yes. Had Carl Still advised you when you made

this examination that he had an automobile accident in 1941 or 1942 and fractured some ribs in his side, either the right or left side, I don't remember which, and that that condition bothered him and disabled him while he was in the United States Army in 1945 and 1946, would you have approved him for employment?

A. First, I would have made inquiry as to the nature of the injury to his ribs, and if, in my judgment, I thought it would give him future trouble, I would have disapproved him.

Q. 112. Would you have inquired, doctor, how seriously he had been hurt in the beginning?

A. I would have.

Q. 113. And would you have inquired how long he had been bothered with this trouble?

A. Yes.

[fol. 1440] Q. 114. And the nature and extent of it and gone into that matter thoroughly?

A. Yes, sir.

Q. 115. And then you would have made your decision?

A. I would have made my decision after that.

Q. 116. Now, doctor, you asked—there's another question appears on here: "Have you ever had tumor, ulcer, physical defect or been operated upon?" The answer is: "No." Had you known at that time that Carl Still during the time that he was in the United States Army in 1945 and 1946 had a severe spondylolisthesis, that his fifth lumbar vertebra was pushed forward on the sacrum by about one half the diameter of the fifth lumbar vertebra, would you under any circumstances have approved him for employment on the Norfolk and Western Railroad Company?

A. No.

Q. 117. And why not?

A. Because that is a defect which frequently gives considerable trouble and considerable disability.

Q. 118. Now, doctor, you—there is another question asked on this application: "If former employee, where employed?" The answer is recorded as: "No previous employment." Why did you want to know whether he had been previously employed by the Norfolk and Western Railway Company?

A. That is prescribed by the Company as a rule, and it

[fol. 1441] is customary to check back on the old records. Now, that's the reason it's done.

Q. 119. Yes. You did examine Carl Still on that occasion, according to your records?

A. Yes.

Q. 120. And you made the findings shown on the records and you approved him?

A. Yes, sir.

Q. 121. At that time, doctor, according to the history that he gave you and the findings that you made there, the screening that you made there, did you believe that he was in physical condition to properly discharge the duties as a yard brakeman?

A. I did.

Q. 122. And did you know that any of these answers were not true?

A. I had no reason to believe that they were not true.

Q. 123. Did you believe him when he told you that?

A. I did. I had no reason to do otherwise.

Q. 124. And relying on the truth of the statements that he made to you, and following your examination, you did approve him?

A. I did.

Q. 125. Carl Still's name appears on this card, doctor. Is it customary for you to have these men sign the card in [fol. 1442] your presence when you fill it out?

A. They sign it and I witness it. If they refuse to sign it, we reject them.

Q. 126. Yes. Now. Dr. Troup, it's in evidence here that Carl Still claims to have had an accident in the west yards of the Norfolk and Western Railway Company on the early morning of January 23rd, 1958. State whether or not Carl Still came to your office on the morning of January 23rd, 1958, and, if so, tell us what occurred there.

A. My records indicate that he did, and also that I referred him to the Company surgeon. He complained of his back. I had not the facilities to determine whether or not he had anything wrong with his back, and inasmuch as that gives considerable trouble, it was to my interest to find out whether or not he had anything wrong with his back. He did not claim at that time that he had an accident on the job.

Q. 127. He did not?

A. To me.

Q. 128. Was he complaining of his back at that time?

A. He was complaining of pain in his back.

Q. 129. So far as you can recollect, doctor, did you examine him?

A. No, I didn't have the facilities—other than I listened to his story and decided that my examination would serve no useful purpose.

[fol. 1443] Q. 130. What suggestion did you make to Carl Still?

A. That he go the Company surgeon.

Q. 131. Then later did you find out whether he had been to the Company—when did you find out that he had been to the Company surgeon?

A. Sometime later. I don't know when because——

Q. 132. I see. Did he appear to be disabled or injured when he came into your office?

A. He didn't appear to have been particularly disabled; otherwise I would not have sent him to the Company surgeon to find out if he were.

Q. 133. Doctor, do all of the men who come into your office to see you complain of injuries?

A. No.

Mr. Walter G. Burton: Now, what's all that got to do with it? We object to it.

The Court: The objection will be sustained.

To which action and ruling of the Court the defendant, by counsel, at the time excepted.

Mr. Sanders, Sr.: That's all right.

By Mr. Sanders, Sr. (Continuing):

Q. 134. Doctor, you say you did then refer him and tell him to go to the Company physician?

A. That is correct.

Q. 135. Doctor, was it necessary for Carl Still to get [fol. 1444] Mr. B. G. Lilly's permission before he could go to the Company surgeon?

A. No.

Q. 136. Who are the Company surgeons?

A. Well, the orthopedists are Dr. Hosmer and now Dr. Raub at Bluefield Sanitarium.

Q. 137. And you say it was not necessary for him to get permission from Mr. Lilly before he could go up to the Bluefield Sanitarium?

A. No, it is not.

Q. 138. Doctor, Carl Still has testified here that while he was in your office, that you talked to Mr. B. G. Lilly on the phone—you had a conversation with Mr. B. G. Lilly on the phone with reference to whether he should go to the doctor or not.

A. I——

Q. 139. Do you have any recollection of any conversation with Mr. B. G. Lilly about Carl Still at all?

A. I have no recollection, because I wouldn't try to remember a thing like that, that far back.

Q. 140. You have no recollection——

A. I have no recollection.

Q. 141. (Continuing)—then, of you calling Mr. Lilly or Mr. Lilly calling you?

A. No.

Q. 142. Having any conversation at all?

[fol. 1445] None at all.

Q. 143. As a matter of fact, do you have a phone in your examining office?

A. There is no phone in my examining room.

Q. 144. Where is the phone?

A. The phone is—there is one in my clerk's office and one in my office that I use for reviewing correspondence and reading medical literature, for the most part, and that's where the phone is. I have to cross the waiting room to answer the phone.

Q. 145. Was there any reason, so far as you can remember, why you should have called Mr. B. G. Lilly on the phone?

Mr. Walter G. Burton: We object to that. That's all speculation and conjecture, we think, Your Honor.

Mr. Sanders, Sr.: We think it is proper.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. No; I do not have to consult anybody when I have a man I want to send to another doctor.

Q. 146. I say, so far as you know now, did you have any reason to call Mr. Lilly?

Mr. Walter G. Burton: Objection.

The Court: Overruled.

[fol. 1446] To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. I have no reason.

Mr. Walter G. Burton: Move to strike out the answer.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, *at the time excepted.*

By Mr. Sanders, Sr. (Continuing):

Q. 147. Now, Dr. Troup, it's in evidence here that Carl Still was out of service for about a year, that he was out of service from about November, 1956, until up in November, 1957—I am not sure about the dates. Did Carl Still come to your office in November, 1957, for any purpose?

A. According to the records, he came to have his eyes examined.

Q. 148. What do I hand you here?

A. This is a form that we use to report the examination made on eyes—periodical examinations on eyes and color vision and hearing.

Q. 149. Yes.

A. That is the form we use to report it.

Q. 150. Is this a part of your permanent records?

A. No, that is a part of the terminal trainmaster's—or the superintendent's permanent records.

[fol. 1447] Q. 151. Is that signed by you?

A. That is my signature.

Q. 152. Does that indicate that on November 18th, 1957, you did examine Carl Still's eyes?

A. That indicates I did.

Mr. Walter G. Burton to Mr. Sanders, Sr.: Is that November 18th, Joe?

Mr. Sanders, Sr.: Yes, November 18th, 1957.

By Mr. Sanders, Sr. (Continuing):

Q. 153. You did examine his eyes?

A. I signed it.

Q. 154. And what did you do with that?

A. Then it is placed in the mail and sent to the man whom it is addressed to—placed in Company mail, not United States mail.

Q. 155. Did you make any other examination of Carl Still on that occasion, Dr. Troup.

A. No; I am not permitted to.

Mr. Walter G. Burton: Now, we object to what he is permitted to do and not permitted to do. That's argument.

The Court: It will be overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

[fol. 1448] At this point, counsel for the plaintiff examined the form in question.

By Mr. Sanders, Sr. (Continuing):

Q. 156. Do you have any record, doctor, of having made any physical examination of Carl Still or any examination other than this examination shown by this paper?

A. No. No, I have no other record.

Mr. Sanders, Sr.: We offer this in evidence, Your Honor.

The Court: It may be introduced.

The form, identified by the witness, was thereupon offered in evidence on behalf of the defendant, and the same was introduced, filed, marked:

"Defendant's Exhibit No. 32. 10-13-59"

and due to the nature of the exhibit introduced, it is not here copied into the record. However, said exhibit is returned with and as a part of this transcript, the same appearng in the envelope of exhibits.

By Mr. Sanders, Sr. (Continuing):

Q. 157. At that time did Carl Still bring to your office an application for employment?

A. No.

Q. 158. If he had, would you have given him a physical [fol. 1449] examination?

A. I would have been required to, according to Company rules.

Mr. Sanders, Sr.: Yes.

Mr. Walter G. Burton: We move to strike out the answer.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 159. Dr. Troup, do you have rules and regulations on the Norfolk and Western Railway Company with reference to periodical examinations of employees?

A. We do have.

Q. 160. What are those rules?

A. Every man in train and engine service or who has to do with the operation of motor vehicles is required to have his eyes examined for visual acuity, distant vision, and color vision, and his hearing examined every two years. Then if—a man beyond the age of fifty who is involved in train and engine service is required to have a physical examination every two years—that is given in our office—and after the age of sixty-five is required to have it every year if he remains in service.

Q. 161. Then, do I understand that after a man passes [fol. 1450] his initial physical examination, that until he—as long as he remains in the employment of the Company, that until he reaches the age of fifty, he does not have to have another physical examination?

A. He does not.

Q. 162. Dr. Troup, after you examined Carl Still in July, 1951, and approved him for employment, did you ever find out at any later time prior to the time he is supposed to have been injured that any of these answers on the cards here were untrue?

A. No, I did not.

Q. 163. If you had found out or suspected that any of those answers were untrue, what would you have done?

A. I would have written a letter to the medical director

stating the facts, and any action would have been taken by the management, not by me.

Q. 164. Dr. Troup, one other question. You say you are the medical director——

A. I am the medical examiner.

Q. 165. (Continuing)—the medical examiner, and you examine these—you have been examining the applicants for employment at Bluefield. When you approve or disapprove a man for employment, is that—your recommendation usually accepted?

A. It is accepted.

Q. 166. Have you ever known an instance, doctor, when [fol. 1451] you would reject a man for employment, that you have been overridden and the man has been employed?

A. No, I don't know of any.

Mr. Sanders, Sr., to Counsel for the Plaintiff: Cross-examine.

Cross-examination.

By Mr. Walter G. Burton:

Q. 1. Doctor, when did Mr. Sanders—how many months ago did he talk to you about these examinations and these cards and records?

A. I don't have any idea how many months ago, but I know he has.

Q. 2. Well, give us your best judgment on that, that he talked to you. How long has it been since the first time he talked to you about these cards and records which you have testified about?

A. I expect it would be at least a month or two. It wasn't too far ahead of the trial.

Q. 3. And you know, of course, that Mr. Sanders later obtained these records from Roanoke a month or two ago, is that right?

A. Yes.

Q. 4. Now, doctor, when you gave Carl this examination on July 24th, 1951, you gave him a thorough examination; [fol. 1452] there is no doubt about that, is there?

A. No doubt.

Q. 5. Now, there has been a doctor who testified here for the N. and W. Railroad, who says he's a neurologist at the

University of Virginia, Dr. Crutchfield. He says when he examined him in August that not only could you see the depression in his back, but it was easy to feel. Did he have that depression in his back when you examined him?

A. If it was there, I didn't see it. I looked for it.

Q. 6. If he had had such a depression in his back at the time you examined him as that, assuming what Dr. Crutchfield said to be true, that you could see it and that you could feel and put your finger in it. He had no such then, did he?

A. If he did, I don't know about it. I looked for it.

Q. 7. Now, with all that rigid examination you gave him, if he had had anything like that, you would certainly have felt it or saw it, wouldn't you?

A. In the first place, I gave him what was typed as a screening examination.

Q. 8. Yes, sir. You have told us that.

A. And I have not sufficient facilities to do more than the ordinary physical examination.

Q. 9. Now, doctor, do you want the jury and this Honor- [fol. 1453] able Court to believe that you gave him, to use your words, a thorough and rigid examination—I believe those are your words? Well, if you gave him a thorough and rigid examination on July 24th, 1951, would you say that you would have found, if he had had at that time, a depression there in his low back that you could feel and that you could see?

A. Before I answer that, would you be kind enough to tell me what you mean by a thorough and rigid physical examination?

Q. 10. Now, I don't know what that means. That's the terms you are using, not me.

A. Well, you are asking me. I gave my opinion, that's what it was, and I am entitled to my opinion.

Q. 11. Well, I'm not questioning your opinion. You used the words, as I got it, thorough and rigid examination. Now, my question, doctor: If you did give him—and I assume you did—a thorough and rigid examination on July 24th, 1951, would you have found, if it was there at that time, a depression in his back, low back, which you could see and which you could feel, if it had been there?

A. I would have.

Q. 12. But you didn't——

A. I did not see it or I would have recorded it.

Q. 13. Yes, sir. Thank you, sir. Now, doctor, is it true that when a man is laid off from the Railroad Company [fol. 1454] —and I am talking about the Norfolk and Western—

A. Yes, sir.

Q. 14. (Continuing)—or he's discharged, and he's taken back, is it the practice over there at Bluefield and in the practice of the N. and W. to require him to have a physical examination before he is taken back?

A. No.

Q. 15. Do you mean that a man can be discharged or laid off for a year or more and he doesn't have to take any examination before he goes back to work?

A. When he is restored to his original job, he does not.

Q. 16. He doesn't even come to see you?

A. He must come to have his eyes examined only.

Q. 17. His eyes examined?

A. Only. His eyes, his hearing, and that's all.

Q. 18. That's all. Now, Dr. Troup, you admit that Carl Still did come to your office on the morning of January 23rd, 1958; you admit that?

A. Yes, sir.

Q. 19. That's true, is it?

A. Yes, sir.

Q. 20. That hasn't been but about nineteen or twenty months ago, has it?

A. That's right.

Q. 21. Now, doctor, Carl Still has testified that you [fol. 1455] examined him and wanted to send him to the Bluefield Sanitarium, and he told you that Mr. Lilly would not permit him to see a doctor. Now, just wait a minute. Do you know what I am going to ask you? Well, why do you shake your head before I get through, then, please, sir? Why do you answer in the negative before I get the question finished?

A. I wasn't answering you. I was just shaking my head.

Q. 22. Yes, sir. Now, let me start all over again. Didn't Carl Still tell you when you told him he ought to go to the Sanitarium—you did tell him that, didn't you?

A. Yes, sir.

Q. 23. And you sent him up to the Sanitarium to your doctors?

A. Yes, sir.

Q. 24. That's Dr. Raub, Dr. Hosmer—I believe you said Dr. Gage?

A. Dr. Gage.

Q. 25. Any of the staff up there are the N. and W., where you send your people?

A. That's correct.

Q. 26. All right. Now, you did tell him to go up there?

A. Yes.

Q. 27. Now, before you sent him up there, didn't he tell you that Mr. Lilly wouldn't permit him to see a doctor?

[fol. 1456] A. No.

Q. 28. Oh, he didn't say that?

A. Not to me.

Q. 29. And didn't you tell him that Mr. Lilly wasn't a doctor and had nothing to do with it?

A. I may have told thim that. I am not required to consult anybody when I send someone to another doctor.

Q. 30. I don't question it.

A. It's generally known on the Railroad, and it's not infrequent that men go to the Sanitarium without seeing their employing officer or anyone else.

Q. 31. Doctor, I am not questioning your authority. I know you have it. Now, then. When you told him to go to the Sanitarium, didn't he tell you that Mr. Lilly told him he couldn't see a doctor? You don't remember that?

A. I don't remember that, definitely not.

Q. 32. You don't remember whether he said that or not?

A. No.

Q. 33. He may have and he may not?

A. He may have and he may not have.

Q. 34. And didn't you tell him then that Mr. Lilly wasn't a doctor and had nothing to do with it?

A. It is very possible I did.

Q. 35. You don't deny that happened?

A. I tell that frequently to people.

[fol. 1457] Q. 36. And didn't you tell hinn then that you would call Mr. Lilly yourself?

A. I do not remember anything about a telephone call.

Q. 37. But you don't deny it?

A. I don't deny it, but I don't remember it.

Q. 38. Yes, sir. And didn't you call Mr. Lilly, and when you got him on the phone, let Carl talk to him?

A. I don't remember anything like that.

Q. 39. But you don't deny it?

A. I couldn't deny it. I don't remember it.

Q. 40. Yes, sir. And didn't Carl say to him on the telephone in your presence that you had told him to go up to the Sanitarium?

A. That I don't remember.

Q. 41. But you don't deny that happened?

A. I don't deny that it happened.

Q. 42. And you do have two telephones in your office?

A. Not in the room that he was interviewed in.

Q. 43. Well, how many offices have you got there?

A. There are four rooms in my office—five counting the waiting room, and six if you count the dark room.

Q. 44. And you have two telephones in some of those four or five rooms, is that right?

A. I have two telephones in that office. In fact, there [fol. 1458] are four now.

Q. 45. Do you recall Carl Still talking on one of those phones?

A. I do not.

Q. 46. Doctor, what did Carl Still come there for that morning?

A. Well, I didn't know. I have to interview everybody who comes in to see me. I never know why they are coming in until they come.

Q. 47. You say he did complain of his back?

A. Yes.

Q. 48. But he didn't say he had been injured?

A. He did not.

Q. 49. Did you ask him if he had been injured?

A. I don't recall now whether I did or not.

Q. 50. Did you ask him what was the matter with his back?

A. I did.

Q. 51. And what did he tell you?

A. That I don't remember now.

Q. 52. You just don't remember?

A. He did not complain of an injury. Therefore, we make no records.

Q. 53. But wait a minute, doctor. You were convinced from what Carl Still told you there and what you saw or what you heard that he ought to go to the Bluefield Sani-
[fol. 1459] tarium Clinic; will you admit that?

A. Yes.

Q. 54. Otherwise you wouldn't have advised him to go?

A. I would not have advised him.

Q. 55. That's right, sir. Now.

Mr. Walter G. Burton to the Court: Will Your Honor bear with me just a minute, please, sir?

Thereupon, Mr. Walter G. Burton looked at his papers.

By Mr. Walter G. Burton (Continuing):

Q. 56. Doctor, you are certain in your own mind that when you examined him here on November 18th, 1957, as shown in your exhibit—pardon me—in your exhibit—Defendan't Exhibit No. 32, that you didn't also make up a card like that?

A. I did not, I am certain.

Q. 57. You are certain you didn't?

A. I did not.

Q. 58. And you are certain that no such card exists?

A. I am certain.

Q. 59. That all you ever made was that little paper there?

A. That little paper.

Mr. Walter G. Burton: That's all.

Mr. Sanders, Sr., to the Witness: That's all, Dr. Troup.
[fol. 1460] The Witness: Is that all?

The Court to the Witness: That's all, sir. You are excused.

Mr. Sanders, Sr.: Can Dr. Troup be excused?

Mr. Walter G. Burton: He may.

* * * * * * *

Witness stands aside.

Dr. D. L. Hosmer, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

• • • • • • •

[fols. 1461-1462] Q. 3. What's your occupation?

A. I'm a physician and surgeon.

• • • • • • •

Q. 5. How long have you been connected with Bluefield Sanitarium?

A. Since 1929.

Q. 6. And have you been specializing in any particular branch of medicine since you have been with the Sanitarium?

A. Yes, sir.

Q. 7. What branch?

A. Orthopedic and traumatic surgery.

• • • • • • •

[fol. 1463] Q. 21. Dr. Hosmer, do you know Carl Still, the plaintiff in this case?

A. Yes.

Q. 22. Did you see him on—following an accident he claims he had on January 23rd, 1958?

A. Yes.

Q. 23. When did you see him?

A. I saw him on January 24th.

• • • • • • •

Q. 28. Did you examine him at that time?

A. Yes.

Q. 29. What was he complaining of at that time, Dr. Hosmer?

[fol. 1464] A. He complained of his left hip and left thigh.

• • • • • • •

Q. 31. Was he complaining of his back?
A. No, sir.

• • • • • • •

Q. 37. Did you disrobe him to examine him, doctor?
A. Yes.

• • • • • • •

[fol. 1465] Q. 41. On this occasion, so far as your records indicate, were there any bruises, wounds, or contusions, or marks of any kind on his body?
A. There wasn't any external evidence of injury.
Q. 42. If you had examined Carl Still and found any bruises, or wounds, or contusions, or lacerations, would you normally have recorded them on your records?
A. Yes.
Q. 43. After you had examined Carl Still, what then did you do, Dr. Hosmer?
A. I had him X-rayed.
Q. 44. Who did you have X-ray him?
A. Dr. Davidson.
Q. 45. And what parts did you have X-rayed?
A. We had his left hip and left femur.

• • • • • • •

[fol. 1466] Q. 49. What did the X-rays disclose?
A. They didn't show any bone injury.
Q. 50. What condition did they show?
A. Nothing.
Q. 41. Did they show a spondylolisthesis?
A. We didn't have X-rays on his back at that time.

• • • • • • •

Q. 53. That's right. You just had the X-rays of his hip and leg?
A. That's right.
Q. 54. And you examined those X-rays and they didn't show anything?
A. That's right.
Q. 55. Now, then, later did Carl Still come back to you?

At this point, the witness looked through his records.

A. I think in the meantime, before I saw him again, he was seen by Dr. Gage and Dr. Hampton St. Clair.

Q. 56. When did you next see him, according to your records?

A. On February 16th, 1958.

Q. 57. At that time what was he complaining of?

A. He was complaining of trouble with his back.

[fol. 1467] Q. 58. Was he then complaining of his left leg and left hip, so far as your records show there?

A. Yes, he was.

Q. 59. Then, did you then examine the X-rays that had been made of his back by Dr. Davidson at the Bluefield Sanitarium?

A. Yes.

Q. 60. What did those X-rays show, doctor?

A. They showed a spondylolisthesis.

Q. 61. Now, what is a spondylolisthesis?

A. It's a slipping forward usually of the fifth lumbar vertebra on the top of the sacrum.

Q. 62. Yes. What kind of a spondylolisthesis would you describe this as, doctor? Was there considerable slipping?

A. Yes.

• • • • • • •

[fol. 1468] Q. 65. Dr. Hosmer, at that time, now, when he came back complaining of back injury and you examined him, what did you find there that you could actually put your finger on to sustain his claim—to substantiate his claim that he was disabled or injured?

A. Well, first, let me say that when I examined him on February 16th, 1958, Dr. Gage had him in the hospital, and I saw him in the hospital.

• • • • • • •

Q. 69. Now, in this case, what objective symptoms did [fol. 1469] you find, according to your records?

A. Well, he had limitation of function in his back and——

Q. 70. Is that an objective symptom or a subjective symptom?

A. Well, it may be either one or the other.

Q. 71. And how can it be either one way or the other?

A. Well—if you ask a person to stoop and they will only

stoop so far, you can't tell whether it's objective or subjective.

Q. 72. I see. Then do you have to take the patient's word for that?

A. Well, I try to in most cases.

Q. 73. Yes. All right. Now, what other objective symptoms did you find?

A. Well, I do not have a record of it here, but I am pretty sure I noticed some defect in his lower spine.

Q. 74. Well, that was of the bony structure?

A. No, I mean on physical examination. They have a little jog there where they have this slipping.

Q. 75. Was that as a result of the forward displacement of the fifth lumbar vertebra on the sacrum?

A. Yes.

Q. 76. Yes. That's the spondylolisthesis?

A. That's right.

Q. 77. Could you tell how long that spondylolisthesis [fol. 1470] had been in existence, Dr. Hosmer?

A. No.

Q. 78. What is the history of these conditions of spondylolisthesis—is that normally and usually caused by accident, or trauma, or is it a congenital condition?

A. The majority of them are due to congenital conditions.

Q. 79. And what do you mean by "congenital"?

A. They are born with it.

* * * * * * *

Q. 81. Dr. Hosmer, in your practice as an orthopedic surgeon, have you found that you do find a great many abnormalities in most people's backs?

A. Yes, it's very common in the lower back.

Q. 82. In the lower back. What portion of the body would you say that you ordinarily find more abnormalities in?

[fol. 1471] A. In the lower back.

Q. 83. In the lower back. And by "abnormalities," do you mean caused by accident or just naturally developed?

A. They are congenital and developmental.

Q. 84. And when you have this condition of spondylolisthesis, doctor, what is the history of these cases as to whether they remain the same, whether they get better, or whether they get worse?

Mr. Walter G. Burton: We object. He has asked the question and the doctor has answered it.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

The Court to the Witness: Go ahead, sir.

A. Well, most of these people are born with that defect, and there may be some progression in the slipping as a result of that defect between the joints there and the vertebrae.

Q. 85. Yes. Do some of the patients you examine, doctor, have a defect down in this same region with no displacement?

A. Yes.

• • • • • • •

[fol. 1472] Q. 87. Doctor, when you find this condition that you describe as spondylolisthesis, when the fifth lumbar vertebra is pushed forward over the sacrum, do you ever find that that condition has fused, or grown together?

A. Very frequently.

Q. 88. You find that?

A. In older people.

Q. 89. In older people?

A. That's right.

Q. 90. Does it have a tendency to fuse as a person gets older?

A. That's right.

Q. 91. And when it fuses, what does that do—what does that develop then?

A. Well, it stops their pain.

Q. 92. Yes. Does the X-ray made by Dr. Davids and which you examined, show any bony injury to the lower back of Carl Still?

[fol. 1473] A. No, sir.

Q. 97. When you first examined Carl Still on January 24th, 1958, when you had him disrobe, did you discover this condition you have described as spondylolisthesis, doctor?

A. No.

Q. 98. And why didn't you discover it at that time?

A. There was no complaint of his back.

Q. 99. No complaint of his back. Dr. Hosmer, assume

that Carl Still up to the time that he claimed to have had this accident on January 23rd, 1958, had had a perfectly normal spine and it had been in proper alinement; and further assume that he was involved in an accident on the early morning of January 23rd, 1958, sufficient to cause the condition which you found in those X-rays taken by [fol. 1474] Dr. Davidson showing this spondylolisthesis; in your opinion, would Carl Still have known about that back injury at the time?

A. Well, a traumatic spondylolisthesis is a right painful and disabling injury—that is, one due to injury.

Q. 100. You say it is a very—spondylolisthesis is a very painful injury?

A. That's right.

Q. 101. And, in your opinion, then, would Carl Still have known about it at the time it occurred?

A. All of them that I have ever seen were disabled immediately.

Q. 102. Disabled immediately. One last question, doctor. Assuming that Carl Still had had this spondylolisthesis for several years prior to January 23rd, 1958, and was involved in an accident which was sufficient to injure him and totally disable him from that time up to this date, in your opinion, would Carl Still at the time that accident occurred have felt pain in his back and would he have known that he was injured in his back?

A. Yes.

Q. 103. And why do you say that, doctor?

A. Well, I think if he had had any aggravation of his spondylolisthesis as a result of his injury, he would have considerable pain in his back.

Q. 104. Immediate pain?

[fols. 1475–1476] A. That's right.

* * * * * * *

Cross-examination.

By Mr. Walter G Burton:

* * * * * * *

[fol. 1477] Q. 11. Yes. Now, that's my point, doctor. As I understand you, when you examined this man, according to your report, and I quote: "On examination it was noted that he pointed out the left trochanteric region and left

sacroiliac region as being the location of his trouble and he claimed some tenderness in these parts." Now, is that true?

A. Yes.

Q. 12. And so he was complaining, then, according to what you found, of this sacro-iliac, the left sacro-iliac——

A. That's right.

Q. 13. (Continuing)—region. And, of course, this fifth lumbar vertebra was displaced on that sacrum, which is a part of the low back, is that right?

A. Yes.

Q. 14. Yes, sir. Now, doctor, I believe when you made [fol. 1478] your report to Dr. W. R. Whitman, Chief Surgeon, Norfolk and Western Railway Company, Roanoke, Virginia, on July 21st, 1958, you said this as your "Opinion":—do you have that, doctor, now?

A. Yes, I've got it.

Q. 15. Now, under — I'm quoting — under "Opinion," which is the last paragraph in your letter, you said: "As you know, it is often difficult to separate a congenital spondylolisthesis from a traumatic one;"—of course, you meant by that, that sometimes it's hard to say whether it's caused by injury, or trauma, or whether it's congenital; that's true, isn't it?

A. That's right.

Q. 16. (Continuing)—"however, in view of the manner of this man's injury as described to me and in view of the fact that there is some spurring about the upper segment of the sacrum, it would be my opinion that he has had some spondylolisthesis for a long time. Whether or not the slipping forward of the fifth lumbar vertebra was increased by his injury of January 23rd, 1958, cannot be definitely stated. It is entirely possible that he had some aggravation of this condition and this could well account for his symptoms referable to it. I am not at all familiar with his present physical status other than that noted in the reports and from the record." Now, at that time—and that was July 21st, 1958—that was your opinion, wasn't it, doctor? [fol. 1479] A. That's right.

Q. 17. And that, I take it, is still your opinion?

A. That's right.

• • • • • • •

Q. 20. Then he can receive—or a person can receive a slight injury and aggravate that and bring it into being and make it be or cause it to be a total disabling injury, isn't that true?

A. That's a possibility, but you would expect the symptoms to be present right from the start.

. . . . . .

[fol. 1480] Q. 25. Yes, sir. I say, assuming that he did have it immediately when he was thrown against the car, that his back hurt through his low back, his stomach hurt, his left hip hurt, and his left leg hurt, would you say that he there received some injury that caused that to start out hurting when it hadn't been hurting before?

A. That's possible. But I would think the pain and disability would be immediate, and I couldn't see any evidence of any aggravation or anything on the X-rays.

. . . . . .

[fols. 1481–1482] Q. 29. Would you say that he has now lost the intervertebral disk between the L-1 and S-5? Maybe I got them backwards, doctor, but you know what I mean.

A. L-5 and S-1.

Q. 30. The fifth lumber vertebra and the sacrum.

A. All right. He does have narrowing undoubtedly.

Q. 31. Sir?

A. He has narrowing of that disk.

Q. 32. And what does that mean?

A. That goes with it—goes with a spondylolisthesis.

Q. 33. Yes, sir. But you can't restore a disk, can you?

A. No; but you can take them out.

. . . . . .

[fols. 1483–1486] B. G. Lilly, a witness heretofore introduced on behalf of the defendant, being recalled for further examination, testified as follows:

. . . . . .

[fol. 1487] Re-cross-examination.

By Mr. Walter G. Burton:

Q. 1. Mr. Lilly, wasn't it October of '56 when he was discharged or laid off by you or by your Company?

A. Yes, sir, it was October.

. . . . . .

[fol. 1488] Q. 6. Yes, sir. What does that record show—what does it say? What does the record say? You had to tell Carl Still that he couldn't work for the Company any more, or words to that effect, whether you claim it was a lay-off or whether you claim it was a cut-off. Now, what does that record show?

A. Well, it was a dismissal. This letter, which was from the superintendent, addressed to Carl, showed that he was dismissed from the service and the date.

Q. 7. Yes, sir. And it didn't say that they were going to take him back?

A. No.

. . . . . .

Q. 9. All right. Now, then. Now, when you took him back and reinstated him, as you say, in November of 1957—[fols. 1489–1492] he was off a little over a year, wasn't he, according to your records?

A. Yes.

Q. 10. Now, when you took him back, didn't you make him sign and didn't he sign certain papers which you have showing that he wouldn't claim any lost time for being off?

A. Yes.

. . . . . .

[fol. 1493] (In the Presence of the Jury)

Re-direct examination.

By Mr. Sanders, Sr.:

Q. 1. Mr. Lilly, it's in evidence here that Carl Still was off from work for about a year, beginning October, 1956.

When he returned to work was he required to file an application and take a physical examination?

A. He was not required to take a physical examination nor required to file an application.

Q. 2. I believe he was required to have his eyes examined?

A. That's correct.

Q. 3. Now, Mr. Lilly, I believe you have what you call Seniority Rosters over on the Railroad, which show the seniority of the various employees?

A. That's right.

Q. 4. Now, I hand you a paper here marked—dated July 1st, 1956, purporting to be a Seniority Roster of various employees on the Bluefield yard. Does that show—let me see that a minute.

Mr. Sanders, Sr., thereupon looked at the Seniority Roster in question.

Q. (Continuing) Does that show the date when Carl Still [fol. 1494] was employed and the date from which his seniority runs?

A. Yes, sir. That shows that Carl Still was employed July 24th, 1951.

Q. 5. And his seniority dates from that time?

A. From that time.

Q. 6. Now, these seniority lists are in order and they date from the time a man is employed?

A. That's correct.

Q. 7. And that is the man's seniority. Let me have that, please, sir.

The witness thereupon complied with the foregoing request.

Q. 8. Now, I hand you a paper here which purports to be a Seniority Roster of the employees on the Bluefield yard, dated January 1st, 1957. Does Carl Still's name appear on that Seniority Roster?

A. No, sir, it does not.

Q. 9. Why does it not?

A. Carl Still was——

Q. 10. Dropped?

A. Dropped.

Q. 11. Dropped from the Seniority Roster. All right. Now, have you been able to locate your Seniority Roster dated July 1st, 1957?

A. No, sir.

[fol. 1495] Q. 12. Do you know for a fact if Carl Still's name appeared on that Seniority Roster?

A. It did not.

Q. 13. It did not. If it is necessary, do you think you could locate one of these?

A. I might find one.

Q. 14. Now, I hand you what purports to be a Seniority Roster dated July 1st, 1958, showing the seniority of the employees, N. and W. employees, on the Bluefield yard. I will ask you if Carl Still's name appears on that Seniority Roster.

A. Yes, sir, it does.

Q. 15. And what is the date of his seniority?

A. July 24th, 1951.

Q. 16. Yes. And then I hand you a paper dated January 1st, 1958—I should have offered you this before and ask you if Carl Still's name appears on that Seniority Roster.

A. Yes, sir, it does.

Q. 17. As of what date?

A. As of July 24th, 1951.

Q. 18. You mean that is the date from which his seniority dates?

A. That is correct.

Q. 19. Yes, sir. And I hand you what—a paper dated July 1st, 1959, showing the Seniority Roster of the N. and [fol. 1496] W. employees at the Bluefield yard, and I ask you if Carl Still's name appears on that Seniority Roster.

A. Yes, sir, it does.

Q. 20. As of what date?

A. As of July 24th, 1951.

Mr. Sanders, Sr., to Counsel for the Plaintiff:

Do you want to see these?

Counsel for the plaintiff declined to examine the records referred to.

Mr. Sanders, Sr.: Your Honor, we are not going—they are rather voluminous. We will not offer them, but they will be here for counsel's inspectic

The Court: All right.

By Mr. Sanders, Sr. (Continuing):

Q. 21. Mr. Lilly, I may have asked you this question. If I have, I won't repeat it. I don't remember. Is it necessary for the men under you, when they, for any reason, want to see a doctor or go to the Bluefield Sanitarium, to get your permission?

A. They get no one's permission.

Q. 22. Is it necessary to get your permission?

A. Not at all, no, sir.

Q. 23. Now, during the time that Mr. Burton was asking you yesterday, with reference to your procedure for dis- [fols. 1497-1499] charging men, and whether your decision to discharge a man had ever been disapproved—how many men during your career on the Railroad have you recommended for discharge, to the best of your knowledge and belief, Mr. Lilly?

A. Six or eight.

Q. 24. Yes. And before a man is given a discharge, is he given a hearing?

A. He is.

Q. 25. Is he given a right to have a member of his organization present at the hearing to represent him?

A. That's true, he does.

Q. 26. Does the Norfolk and Western have an agreement with the B of RT, a working agreement with respect to grievances and working conditions of the employees and the Company?

A. They do.

Q. 27. They have a contract under which these grievances are handled, is that correct?

A. That is correct. That's correct.

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[fol. 1500] Dr. S. G. Davidson, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name?

A. Dr. S. G. Davidson.

Q. 2. Where do you live, Dr. Davidson?

A. I live in Bluefield, West Virginia.

Q. 3. What's your business or occupation? You're a doctor, are you?

A. I'm a physician, specializing in X-ray.

Q. 4. With what institution are you connected, Dr. Davidson?

A. I'm connected with Bluefield Sanitarium.

Q. 5. In what capacity? What is your position?

A. As X-ray doctor.

Q. 6. X-ray. You supervise the taking of the X-ray pic-
[fol. 1501] tures and you interpret the X-rays?

A. That's correct.

Q. 7. How long have you been with the Sanitarium, doctor, in charge of the X-ray Department?

A. Since 1935.

Q. 8. Do you have anyone else with you there now in the X-ray Department?

A. Yes, I have Dr. John Warden.

Q. 9. And you have been in charge of that department since when?

A. Since 1935.

Q. 10. Since 1935. Doctor, are you a graduate of a medical school?

A. Yes, sir.

Q. 11. What school?

A. I'm a graduate of the Medical School of the University of Virginia, class of 1927.

Q. 12. What did you do after you got out of school?

A. Well, I first had a rotating internship for one year at the Roanoke Hospital in Roanoke, Virginia. Following that, I did four and a half years of general practice in Botetourt County, Virginia.

Q. 13. Where was that in Virginia?

A. Botetourt County, near Roanoke.

Q. 14. Yes.

A. Then following that, I re-entered the University of [fol. 1502] Virginia under Dr. Vincent Archer in the X-ray Department and went through a residency of two years, the first as assistant resident on X-ray, and then the last year as resident physician on X-ray. Upon completing that service, I came immediately to Bluefield Sanitarium, and have been there since that time.

Q. 15. Then you have had intensive training before you came to the Sanitarium in the taking and interpretation of X-rays?

A. Yes, sir.

Q. 16. And since you came to Bluefield Sanitarium, have you done that exclusively?

A. That's correct.

Q. 17. That's all you have done?

A. That's correct.

Q. 18. Taking and interpretation of X-ray pictures. Dr. Davidson, did you at the request of Dr. D. L. Hosmer take some X-ray pictures of Carl Still about January the twenty-fourth, 1958, or close about that time?

A. My record would indicate that Carl Still was X-rayed on January 24th, 1958, at Dr. Hosmer's request. The examination consisted of an X-ray of his left hip and femur, or thigh.

Q. 19. Was there any other part of his body X-rayed?

A. No, sir.

Q. 20. Just the left hip and thigh. What were your [fol. 1503] findings, doctor?

A. We found no bone injury.

Q. 21. What else—did you find any abnormal condition in the back?

A. Not to my remembering.

Q. 22. No bone injury to the left thigh and hip?

A. That's correct.

Q. 23. You didn't take any X-ray pictures of the back on that occasion, did you?

A. No, I did not.

Q. 24. Now, later did you take further X-ray pictures, of Carl Still's back?

A. Yes, sir. On February 13th, 1958, at the request of Dr. Gage I made films of his lumbosacral spine. That's his lower back.

Q. 25. Yes. And what did the films disclose, doctor?

A. I have a copy here of the report that I made on his back, which reads as follows: "There is marked slipping forward of the body of the fifth lumbar on the first segment of the sacrum with narrowing of the joint. There is deformity to the under-posterior surface of the body of the fifth lumbar with slight lipping of the upper anterior portion of the first segment of the sacrum, indicating that this condition has been present over a long period of time. There was no bone injury."

Q. 26. What do you mean by saying that this condition [fol. 1504] must have been present over a long period of time?

A. Well, a period of several years at least.

Q. 27. And when you said, "No bone injury," what did you mean by that?

A. There was no fracture.

Q. 28. No fractures. This condition that you found, what is the name of it, doctor, that you found there?

A. Technically, it's called a spondylolisthesis.

Q. 29. Yes. Doctor, about how far was the—at the time you X-rayed Carl Still how far was the fifth lumbar vertebra pushed forward and extending over the sacrum?

A. It was about half the distance of the diameter of the body of the fifth lumbar.

Q. 30. About one half of the diameter of the fifth lumbar vertebra?

A. That's right.

Q. 31. Doctor, what caused you to believe that this was a condition of long standing, the condition you found in the X-ray picture?

A. The deformity to the under-posterior surface of the body of the fifth lumbar together with a very slight lipping of the upper anterior portion of the body of the first segment of the sacrum.

Q. 32. Do you frequently encounter this condition you have described as spondylolisthesis?

A. Well, it occurs.

[fol. 1505] Q. 33. Is it unusual, I mean?

A. No, it's not particularly unusual.

Q. 34. What usually causes it, doctor?

A. You are usually born with the condition.

Q. 35. Usually born with it.

A. It develops, however, when you begin walking, weight-bearing.

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EUGENE E. NICEWONDER, another witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sanders, Sr.:

Q. 1. What is your name, please?

A. Eugene E. Nicewonder.

• • • • • • •

[fol. 1506] Q. 4. What is your business or occupation?

A. General yardmaster for the Norfolk and Western Railroad.

Q. 5. How long have you held that position?

A. Five years, sir.

• • • • • • •

[fol. 1507] Q. 18. I see. And, now, your present job here, you have worked yourself up from a yard brakeman up to general yardmaster for the Norfolk and Western?

A. Yes, sir.

Q. 19. I take it, then, if you have served as yard brakeman in the Bluefield yard, that you have had considerable experience in that work?

A. Yes, sir.

Q. 20. As a yard brakeman?

A. Yes, sir.

Q. 21. And that you have had considerable experience in all kinds of switching operations in the—both east and west yards in Bluefield?

A. Yes, sir.

Q. 22. Mr. Nicewonder, do you know Carl Still, the plaintiff in this case?

A. Yes, sir.

Q. 23. He worked under you, did he?

A. Yes, sir.

[fol. 1508] Q. 24. Did you have any reason to believe prior to the time that Carl Still claims that he was injured on January 23rd, 1958, that he had made incorrect answers in his application for employment in 1951 or that he had incorrectly answered questions propounded to him by the medical examiner?

A. No, sir.

Q. 25. Did you have any reason to believe that he was not physically fit, and physically fit in every way, to perform the duties of yard brakeman?

A. No, sir.

Q. 26. Did you know unti the trial—did you know prior to that—to January 23rd, 1958, that he had anything wrong with his back?

A. No, sir.

Q. 27. Or that he was in any way physically incapacitated or unfit for work as a yard brakeman?

A. No, sir.

• • • • • • •

[fol. 1509] Q. 32. When did you find out that Carl Still was claiming that he had been hurt?

A. Oh, it must have been a month or so after that before I heard about it.

• • • • • • •

Q. 35. When the men on the Railroad, the employees, want to mark off sick, what—how do they do that, Mr. Nicewonder?

A. They contact the office and ask to be marked off sick, and they are marked off sick.

Q. 36. And do they—are there any questions asked down there——

A. No, sir.

Q. 37. (Continuing)—when they want to mark off sick?

A. No, sir.

[fol. 1510] Q. 38. They mark off sick and that's it?

A. That's it.

Q. 39. Do you or anyone else, any of the other officials

down there, have anything to do with preventing these men from marking off sick when they want to mark off sick?

A. No, sir.

Mr. Walter G. Burton: We object.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. (Continuing) No, sir.

Q. 40. Have you yourself ever attempted to prevent a man from marking off sick when he wanted to mark off sick, Mr. Nicewonder?

Mr. Walter G. Burton: We object.

A. No, sir, I have not.

• • • • • • •

[fol. 1511] Q. 42. Mr. Nicewonder, does it ever happen on the yard in these switching operations that a train will overtake and couple up to a car or a draft of cars which have been cut off?

A. Yes, it does.

Q. 43. How frequently does that happen on the yard over there at Bluefield?

A. It happens very frequently.

Q. 44. Very frequently. Does the Railroad Company require the brakemen to get off of a car or draft of cars before it is coupled to?

[fol. 1512] A. No, sir.

Q. 45. What is the practice in that regard?

A. The brakemen look in both directions, and they are alert to this coupling, and they protect themselves when the coupling is being made.

Mr. Walter G. Burton: Move to strike out the answer.

The Court: It will be overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr.: (Continuing):

Q. 46. Then it is not customary for them to get off of the cars before the coupling is made; right?

A. It is not customary.

Q. 47. What do your rules provide with reference to the speed, the maximum speed, at which a coupling can be made?

A. Four mile per hour is a safe coupling.

Q. 48. Four miles per hour——

A. Yes, sir.

Q. 49. (Continuing)—is considered a safe coupling speed?

A. Yes, sir.

Q. 50. Does that mean, that four miles an hour, that a train is traveling four miles an hour, and coupled up to [fol. 1513] a standing car?

A. Yes.

Q. 51. Does that often happen in the yard and is that routine?

A. Yes, sir, if happens every day.

Q. 52. Now, Mr. Nicewonder, assume—assume that—that in a switching operation involving the classification of cars, that a train is proceeding in a westerly direction at a speed of about three or four miles an hour and the westerly car is cut off to a brakeman and drifts down the track, but then later the train overtakes that car and couples to that car while that car is moving. Do you have any opinion as to the force of that coupling operation, the force of the impact when the coupling is made?

A. It would be a very light coupling, a very light coupling.

Q. 53. Would it be lighter than if the car were standing?

A. Yes, sir, considerably lighter.

Q. 54. Now, if, in the situation that I have described to you, the coupling was made and some slack ran out of some of the cars, could the brakeman hear the slack running out of the cars in time to protect himself?

A. Yes, sir.

. . . . . .

[fol. 1514] Q. 55. Would you give us some idea, Mr. Nicewonder, on this matter of the slack running out? I take it that before the slack runs out, the coupling has to be made, doesn't it?

A. Yes, sir.

Q. 56. And then what happens? Does the slack then start running out after the coupling is made?

A. Yes, sir, the slack will run from one car to the other.

Q. 57. Now, on a long train—for instance, you have got a train of sixty-nine cars here; that was the number of cars on this train. It couples up to a car and the slack starts running out. If that slack came all the way from the engine on down, how long, in your opinion, would it take the slack to get down to the last car?

A. Five or six seconds.

Q. 58. Yes. And even though the slack started running out further on down towards the end of the train, do you say that the brakeman on the last car can hear the slack coming in time to brace himself and protect himself?

A. Yes, sir.

Q. 59. Are the men, brakemen, over there instructed and [fol. 1515] trained in the manner of keeping a lookout in these switching operations? If so, what instructions and training are given them?

Mr. Walter G. Burton: We object to that. He can show what was given Carl Still if he wants to, but what was given to somebody else is a different matter.

The Court: It will be overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. The general instructions to yard brakemen are to look in both directions when being on cars, and also to protect themselves against unnecessary movement or slack action.

. . . . . .

Q. 60. Is it possible, Mr. Nicewonder, to avoid this slack action when you are having these switching operations? Is it possible?

A. No, sir, the slack action is present in every switching operation.

[fol. 1516] Q. 61. Yes. And is this a matter of common knowledge among the brakemen on the Railroad?

A. It is.

. . . . . .

Q. 62. Now, Mr. Nicewonder, do you always—when you cut a car off or a draft of cars off from the train and let it drift on down there in the west yard, or even in the east yard, do you always stop the train after you cut the car off, or do you keep the train moving slowly?

A. You keep the train moving slowly as long as you have car riders to cut the cars off.

. . . . . .

[fol. 1517] Q. 64. And then you send the motor car down the track and you bring them all back?

A. That's correct.

Q. 65. And you start the operation over again?

A. That's correct.

Q. 66. When that happens, you have to stop the train, don't you?

A. Yes, sir.

. . . . . .

[fol. 1518] Q. 67. Then when you do have enough brakemen to continue cutting your cars and taking them down, do you, or not, continue to let the train move back slowly?

A. Yes, sir, the train continues to move slowly.

Q. 68. Are there any flood-lights down there in the yard that would enable these men to see clearly during these switching operations?

A. Yes, sir.

Q. 69. What kind of flood-lights do you have down there in the west yard?

A. We have flood-lights mounted on towers that shines in both directions; also a flood-light just south of the yard office that shines in the yard office direction northwardly at this particular place.

Q. 70. What's the purpose of those flood-lights?

A. That's to illuminate the area where the men are working.

Q. 71. And can you see good down there in the nighttime when these flood-lights are burning?

A. Yes, sir, you can see very good. In fact, a yard conductor can read a switch list at this point.

[fol. 1519] Q. 72. Are these lights burning every night?

A. Yes, sir.

. . . . . .

Q. 74. Do you know Mr. A. N. Davis, the engineer that was in charge of the train that Carl Still claims he was injured on?

A. Yes, sir, I do.

Q. 75. How long have you been knowing Mr. Davis?

A. A good many years; I don't know exactly.

Q. 76. Have you observed the manner in which he operates engines?

A. Yes, sir.

Q. 77. Did you work as a yard brakeman or a conductor down on the yard when he was operating engines over the yard?

A. Yes, I have.

Q. 78. Do you consider him a competent engineer?

A. Yes, sir.

Q. 79. Have you ever observed Mr. Davis handling his [fol. 1520] engine or his trains in an improper or rough manner or jerking the trains or the cars?

A. No, sir, I have not.

Q. 80. Have you ever heard any complaint made against —about the manner in which Mr. A. N. Davis performs his duties?

A. No, sir.

Q. 81. Tell us, Mr. Nicewonder, just the general procedure that you go through down there in these switching operations. Very briefly, just the procedure.

Mr. Walter G. Burton: Objection.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 82. Now, who is in charge of the operations?

A. The assistant yardmaster on duty is in charge of the operation.

Q. 83. And who does he then instruct?

A. He issues his instructions to the yard conductor, who is in charge of the yard switching crew.

Q. 84. And tells him what switching is to be done?

A. Yes, sir. The yard conductor notifies the men working under him, which includes the engineer and fireman

and the yard brakemen, as to what switching is to be per-
[fol. 1521] formed.

Q. 85. Yes. Mr. Nicewonder, are these switching operations—do they differ from day to day or from time to time, or are they more or less routine operations?

A. It's a routine operation, and it's on a twenty-four-hour basis.

Q. 86. Goes on all the time?

A. Twenty-four hours a day.

Q. 87. Now, you have a board down there, I believe, with lights on it? You have a board—some boards down there with lights on them?

A. Yes, sir.

Q. 88. You have a red light, a yellow light, and what other—is there any other lights on it?

A. Just the two lights.

Q. 89. Sir?

A. Just the two lights, red and yellow.

Q. 90. And when the red light goes on, what does that mean?

A. That means to stop.

Q. 91. And the yellow light, what does that mean?

A. Proceed.

Q. 92. And what means to back up?

A. A flash yellow light means to back up.

Q. 93. And they are located on poles, I believe?

A. Yes, sir.

[fol. 1522] Q. 94. About thirty feet high?

A. Yes, sir.

Q. 95. One of those, I believe, is about—is just east of the west yard office, and one is on a pole located on the bank at the north end of the Poplar Street bridge?

A. Yes, sir.

Q. 96. Do you have one set—mounted at about the center of the Allen Street bridge?

A. Yes, sir.

Q. 97. Can they be seen from both the east and west side?

A. Yes, sir.

Q. 98. And these lights, I believe, are controlled by a switch located at the yard conductor's stand?

A. Yes, sir.

Q. 99. And what other methods of communication do you have down there other than these lights?

A. We have two-way radio communication between the engine and the yard office; also a public address system and a fog horn located at the west yard office.

Q. 100. Can any or all of these means of communication be used in case of emergency?

A. Yes, sir.

Q. 101. In notifying the engineer?

A. Yes, sir.

Q. 102. How much braking pressure does it take, Mr. [fol. 1523] Nicewonder—after one of these cars is cut off and is drifting down towards the classification track, how much pressure does it take to control the brakes on that car, to apply the brakes or release them?

A. It takes a very little, a very little.

Q. 103. You have already testified that frequently after a car has been cut off, that the train overtakes it and couples up again. What usually causes that situation?

Mr. Walter G. Burton: We object to that.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

A. Usually this is caused by a yard brakeman applying too much brake on the car on which he is riding and slows it down, and the following cars will overtake it.

Mr. Walter G. Burton: Move to strike out his answer.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 104. During your experience as a yard brakeman, Mr. Nicewonder, have you ever been on a car that had been cut off and had the train recouple up to it again?

[fol. 1524] A. Yes, sir,——

Mr. Walter G. Burton: Objection.

A. (Continuing)—many a time.

Mr. Walter G. Burton: Move to strike out the answer.

The Court: It will be overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

By Mr. Sanders, Sr. (Continuing):

Q. 105. You have had that happen many times?

A. Many.

Mr. Walter G. Burton: Objection.

Q. 106. Did you get thrown from the car or hurt or suffer any inconvenience whatsoever?

Mr. Walter G. Burton: Objection.

A. No, sir.

The Court: Overruled.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

Mr. Sanders, Sr., to Counsel for the Plaintiff:

Cross-examine.

Cross-examination.

By Mr. Walter G. Burton:

* * * * * * *

[fol. 1525] Q. 3. Is the engineer, when he gets a red board, supposed to push through it going at three or four miles an hour for two or three minutes?

A. (The witness made no reply to the foregoing question.)

Mr. Walter G. Burton to the Reporter: Read him the question if he doesn't understand it.

The Reporter: (Reading from the record) "Is the engineer, when he gets a red board, supposed to push through it going at three or four miles an hour for two or three minutes?"

A. He is not supposed to push through the red board any longer than it is necessary for him to stop the train.

Q. 4. Take him about six to eight feet to stop going [fol. 1526] at three or four miles an hour?

A. No, sir.

Q. 5. How long would it take him to stop?

A. It would take him a car-length, which would probably be thirty feet.

Q. 6. Thirty feet?

A. Thirty or thirty-five feet.

Q. 7. But he certainly could stop in that distance, is that right?

A. Yes, sir.

Q. 8. Now, you say that the brakesman are supposed to watch in both directions. Explain to us how he can do that at the same time.

A. That's easy.

Q. 9. All right, tell us.

A. You can turn your head and look forward and backward.

Q. 10. At the same time?

A. Simultaneous, backward and forth.

Q. 11. He would have to turn his head, wouldn't he?

A. Yes, sir.

Q. 12. Now, let me ask you this: When a man's car has been cut off and he looks back at the train and board and sees that the board is red, is he supposed to keep on watching, not in front of him or where he is going or what he is doing, but back there at the west end of the train from [fols. 1527-1528] which he has been cut off? Is he supposed to do that, now, after the board has been turned red and he sees it?

A. Yes, sir, he is supposed to look forward and backward at all times during his operation of handling this car.

. . . . . .

[fols. 1529-1530] Q. 23. Now, what Mr. Sanders is asking you about is just a car coupling going four miles an hour, not stopping it and jerking it, too, at the same time; you didn't mean that, did you?

A. The speed of four mile an hour, when a train is stopped and the slack runs out, it stops, the slack action will be very light, very slow.

. . . . . .

[fol. 1531] B. G. LILLY, a witness heretofore introduced on behalf of the defendant, being recalled for further examination, testified as follows:

Re-cross-examination.

By Mr. Walter G. Burton (Continuing):

Q. 6. Mr. Lilly, as I understand from you, Carl Still, you say, was reinstated some time in the month of November, 1957, after he had been off a spell?

A. Yes.

• • • • • • •

[fol. 1532] Q. 8. Is that the letter, Mr. Lilly, that you refer to?

A. Yes, sir, this is the letter I refer to.

• • • • • • •

The copy of the letter dated November 8th, 1957, identified by the witness, was thereupon offered in evidence on behalf of the plaintiff, and the same was introduced, filed, marked:

"Plaintiff's Exhibit No. 21. 10-13-59"

• • • • • • • • •

Q. 9. Now, I hand you here a letter dated November 13th, [fol. 1533] 1956, which I requested you to furnish me, and which you did furnish me, showing Carl Still's dismissal. Is that the letter, Mr. Lilly?

A. Yes, sir, that's the letter.

• • • • • • •

The letter dated November 13th, 1956, identified by the witness, was thereupon offered in evidence on behalf of the plaintiff, and the same was introduced, filed, marked:

"Plaintiff's Exhibit No. 22. 10-13-59"

• • • • • • •

Q. 10. Mr. Lilly, I hand you another letter, addressed to you, dated November 18th, 1957, which purports to be

signed by Carl Still, and ask you if you had him sign that letter when you claim he was reinstated.

A. That's correct.

• • • • • • •

[fols. 1534-1538] The letter dated November 18th, 1957, purporting to be signed by Carl Still, identified by the witness, was thereupon offered in evidence on behalf of the plaintiff, and the same was introduced, filed, marked:

"Plaintiff's Exhibit No. 23. 10-13-59"

• • • • • • •

[fols. 1539-1540] Re-direct examination.

By Mr. Sanders, Sr.:

Q. 1. Why did you write this letter of November 18th, 1957, to Carl Still, Mr. Lilly?

A. That was in line with the agreement between the General Chairman of the B of RT and the General Manager of the Norfolk and Western Railway.

• • • • • • •

[fol. 1541] (In the Presence of the Jury)

R. V. Danner, a witness heretofore introduced on behalf of the defendant, being recalled for further examination, testified as follows:

Re-direct examination.

By Mr. Sanders, Sr.:

Q. 1. Mr. Danner, at my request did you arrange to obtain for me the original medical examinations of Carl Still——

A. I attempted——

Q. 2. (Continuing)—made by Dr. Troup in 1951, 1948, and 1943?

A. I attempted to make the arrangements through Roanoke, but when I called Roanoke, I found out Dr. Troup had beat me to it and got them ahead of me, and then Dr. Troup brought them to me.

[fol. 1542] Q. 3. Mr. Danner, do you have any distinct recollection as to the definite date that I received those original applications?

A. I couldn't say the exact date, no, sir.

Q. 4. Could you tell me approximately how long it was before we began the trial of this case on October 5th, 1959?

A. I would say a week or ten days.

• • • • • • •

Mr. Sanders, Sr.: Now, Your Honor, we want to read the deposition of Dr. E. L. Gage,

• • • • • • •

[fol. 1543] Direct examination.

By Mr. Sanders:

• • • • • • •

[fol. 1544] Q. Yes, sir. Doctor Gage, how long have you been on the staff of the Bluefield Sanitarium Clinic and specializing in neurosurgery?

A. I have been on the staff of the Sanitarium since 1941 and the Sanitarium Clinic since its opening.

[fols. 1545-1546] Q. Doctor Gage, did you have occasion to examine Carl Still, the plaintiff in this case?

A. Yes. I examined Carl Still on February 13, 1958.

• • • • • • •

[fols. 1547-1581] A. Yes, sir. I examined him completely that afternoon here in the Clinic. My notes are as follows: • • • There was a marked exaggeration of the lumbar curve. • • • My impression: Low back disability, exaggerated lumbar curve, question of spondylolisthesis or central disc, and when I finished examining him I had an X-ray taken downstairs under the direction of Doctor Davidson.

• • • • • • •

[fol. 1582] Mr. Sanders, Sr.: Your Honor, I now desire to introduce in evidence a letter dated—a copy of a letter dated June 17th, 1958, from Isaac Gutman, M.D., to Bernard Savage, Esquire, Mathieson Building, Baltimore 2,

Maryland, entitled, "Re: Carl Still." Mr. Burton and I have agreed that this copy of this letter may be read——

. . . . . .

[fol. 1583] "I saw the above captioned on June 12, 1958.

. . . . . .

[fol. 1584] With the patient standing there is a very definite curve of the lower back. * * * Even when the patient attempts to straighten the left hip and knee he still does not straighten the back, which is maintained in a flexed and slightly listing position.

. . . . . .

[fol. 1585] He is quite tender at the lumbosacral joint and there seems to be a shelf of bone projecting backward as one might see in a spondylolisthesis. There seems to be a rather deep curve in the mid lumbar area when the patient attempts to stand erect. From the standing position he flexes only a few degrees.

. . . . . .

"With the patient lying supine he maintains a moderate lordosis of the lower spine.

. . . . . .

[fol. 1586] "Comment: This man has a rather marked severe spondylolisthesis with forward slipping of L5 on S1 with more than half of the body slipped forward. There is marked narrowing of the L5-S1 disc space. He probably has considerable traction effects on the nerve root of the left lower extremity. According to his history, he was the epitome of health prior to the injury. He states that he was able to bend, twist, turn, do back flips and lift a couple of hundred pounds; he had no previous difficulty of any kind with his back. In view of the condition in which this man finds himself at present, as the result of the accident, which is apparently an aggravation of a congenital defect and the severe traction pain, I would suggest that he undergo a spine operation; that is, exploration of the nerve roots by [fols. 1587-1590] a neurosurgeon and at the same time, if

feasible, a spine fusion. As he is at present, he is not able to work as a brakeman or any other type of work except sitting or possibly light work.

"Sincerely yours, /s/ Isaac Gutman, Isaac Gutman, M.D."

• • • • • • •

[fol. 1591] And, Thereupon, the plaintiff, to further maintain the issue on his behalf, introduced the following evidence,

IN REBUTTAL

Mr. Walter G. Burton: Now, if Your Honor—in rebuttal—I have shown this to Mr. Sanders and this happened at the pre-trial conference, and I want to introduce it—to read it to the jury.

• • • • • • •

[fol. 1592] Mr. Walter G. Burton: (Reading Plaintiff's Exhibit No. 24)

"Carl Still vs. Norfolk & Western Railway Company, a Corp. T.O.C. Case No. 5734.

"Pre-trial Conference—Monday, August 10, 1959, at 10:18 a.m. in the Chambers of the Court in Princeton, West Virginia.

"Mr. Sanders, Sr.: Well, Your Honor, I think Mr. Burton has stated substantially the way the accident occurred. There will be, I think, some conflicting statements, I think, as to how it occurred, but we will admit that the train did couple up with the car on which Still was riding. We don't know whether he was injured on that occasion or not, and we take the position that the burden is on him, even if there was negligence on the part of the Railway Company, to prove the injuries he alleges in the declaration. I can't recall offhand of anyone that actually saw the accident, and it may be that he's the only person that knows exactly how he was injured, if he was injured.

"We deny that the Railroad Company was guilty of any negligence. We deny that the plaintiff was in-

jured in the manner and to the extent that he alleges, and we deny now that he is totally and permanently disabled from work.

"That's about all we have to say about it.

[fol. 1593] "The Court to Mr. Sanders, Sr.: What is your position with reference to the car backing into or coupling into the car?

"Mr. Sanders, Sr.: It did couple into it.

"The Court: That it was done pursuant to proper signals?

"Mr. Sanders, Sr.: Yes, sir.

"Mr. Burton: Judge, pardon me; I don't want to bother Your Honor and I don't want to jump in—was Your Honor through? I want to ask Mr. Sanders some questions for the record.

"The Court: All right.

"Mr. Burton: Now, as I understand from Mr. Sanders, he claims or one of his defenses will be that this man was not injured on this occasion. Now, if I am wrong, I want to find it out. In other words, he wasn't hurt there?

"Mr. Sanders, Sr.: I say he was not injured in the manner and to the extent that he claims. It's possible he was jolted maybe and knocked against the side of the car to some extent. I don't say that he didn't have a mark on him, that he didn't strike the car. But I simply say we deny he was injured in the manner and to the extent he claims, and we will expect the plaintiff to prove that he was. He is the man that knows about that. The burden of proof is on him to do it. In other words, we are not admitting these injuries that they claim in the declaration.

* * * * * * *

"The Court: Mr. Sanders, as I understand him, says the train did jolt him and that there is no evidence of serious injury following this jolting, as I understand you.

"Mr. Sanders, Sr.: That's exactly right. And he has told several conflicting stories about how he was injured. I think it will be up to the jury which one to believe, and I think it will be up to the jury to de-

termine from his own evidence and from the evidence [fol. 1594] of the people down there if he was injured and to what extent he was injured and whether he is disabled. That's the plaintiff's case. We are going to expect him to prove all those things.

"Mr. Burton: We accept the challenge that the burden is on us to prove our case in all respects. That's all I want to ask, I think, Your Honor.

"The Court: All right, sir."

CARL STILL, the plaintiff herein, heretofore introduced as a witness on his own behalf, being recalled for further examination, testified as follows:

Direct examination.

By Mr. Walter W. Burton:

Q. 1. You are Carl Still, the plaintiff in this case?
A. Yes, sir.

. . . . . .

Q. 2. Carl, at the time you were employed by the Norfolk and Western Railroad Company in 1951, on July 24th, [fol. 1595] and at the time you went to work for the Railroad Company in 1957, did you at that time intend to mislead or misrepresent anything to the Railroad Company in regard to any application or statements made by you when you applied for a job?

A. No, sir.

. . . . . .

[fol. 1596] COLLOQUY

(IN THE ABSENCE OF THE JURY)

Mr. Sanders, Sr.: In this case, as you will remember, on the first day of the trial I tendered Defendant's Special Plea No. 1, which the Court permitted to be filed, and at [fols. 1597-1604] that time it was understood the plaintiff would file a Demurrer to it. I saw that Demurrer on yesterday.

I tender here and ask leave to file Defendant's Amended Special Plea No. 1, which contains some facts already shown in evidence.

. . . . . .

[fol. 1605] The Court: Well, I will have to assume that that's a correct pleading. I just very frankly don't know what the rule of the court is on it. I take it that's correct.

Mr. Walter G. Burton: Well, I take it, then, the Court overrules our objection to the filing of Defendant's Amended Special Plea No. 1?

The Court: Yes, sir.

. . . . . .

[fol. 1606] Mr. Walter G. Burton: Now, of course, we haven't had time to read this Plea in its entirety either—it has just now been handed to us—but we now want to demur to this Plea. We haven't, of course, got time here to leave the court room and go prepare that Demurrer—unless the Court will have it understood that we have a right to file that Demurrer—and we now assign as grounds for our Demurrer all the objections to the filing of the Plea and all of the grounds set up in our Demurrer this day filed to the Special Plea. We want it understood that our Demurrer can incorporate our objections why it shouldn't be filed and the grounds already set up in our Demurrer to the Special Plea No. 1—can and will be filed to the Amended Special Plea No. 1.

The Court: It may be done.

Mr. Walter G. Burton: And, Your Honor, I take it that in view of the Court's ruling, that our Demurrer will be overruled?

The Court: Yes, sir.

. . . . . .

Mr. Walter G. Burton: Yes, sir. Now, we, then, in order [fol. 1607] to get the issues straight and the record straight as we go along, we, then reply generally to the Defendant's Amended Special Plea No. 1 and we deny the allegations of the Plea.

The Court: All right, sir.

. . . . . .

[fol. 1608] Mr. Sanders, Sr.: Your Honor, we want to make a motion on behalf of the defendant to direct a verdict in favor of the defendant on the ground and for the reason that the plaintiff in this case in his application for employment in July of 1951 and in the medical examination conducted by Dr. Troup made false and fraudulent representations with reference to his past medical history, previous accidents, his medical discharge, his Army serv-[fol. 1609] ice and other matters shown on the card, and that these false representations were relied on by Dr. Troup and by the Railroad Company in accepting the plaintiff as an employee; that the falsity of these answers was not discovered by the Railroad Company until subsequent to January 23rd, 1958; that if the Railroad Company, if Dr. Troup and the Railroad Company had received truthful answers to these questions propounded in the application and in the medical examination conducted by Dr. Troup, that the plaintiff would most certainly not have been accepted for employment.

. . . . . .

Mr. Walter G. Burton: Now, I don't find any case—and we don't find any cases—where the attorney for the Railroad Company has taken a position in the pre-trial conference, and they did not claim—although they had the records, Your Honor, they did not claim that he had what they now claim by their Special Plea and their Amended [fol. 1610] Special Plea. We say they are bound by that. What would the Court do about that? I mean, what would this Court do about it? Is there any question about it?

But here comes something else more particular. They can show me no case, and we have found no case, where they come into court—I realize the rule, now, that in some instances they can be relieved of the stipulation—mind you, when this stipulation was made, under the evidence, they had these records—they make a stipulation in writing that this man was engaged in interstate commerce at the time he claims he was injured under the Federal Employer's Liability Act. Now, what is the Court going to say about that? Is there any question about that? There is not only a question of law, there is a question of fact about it, and it's a serious thing.

Now, I know they say—they have no plea to this—he was dismissed in October of '56. They can say he was dismissed if they want to; the evidence shows—you can call it dismissed, but he was fired for an infraction. If the Court says that that is true—is there any question about it? —then he was taken back under a new contract and all that Mr. Sanders is saying here has no application whatsoever. Now, they can dismiss that lightly, if they please, but he was operating under a contract between the Brotherhood of Railroad Trainmen and the Railroad Company. He was fired. I don't care if they call it dismissed. His em-[fol. 1611] ployment was ceased; he had no employment; he was kept out of that employment over a year, from October, '56, until the middle of November, '57. Now, is there any question about that in Your Honor's mind? Is there any question about what the courts will say about that? Now, if we're correct in any part of our thinking, then the plea goes entirely out and all the evidence under the plea which Mr. Sanders has been arguing about.

Upon the completion of Mr. Walter G. Burton's argument in opposition to said motion to direct a verdict in favor of the defendant, in reply thereto, Mr. Sanders, Sr., stated, in part, as follows:

Mr. Sanders, Sr.: Now, on this stipulation, and that's about the last thing I have to say here. I did make that stipulation that he was an employee and engaged in interstate commerce. I did that to accommodate Mr. Burton, to keep Mr. Burton from having to prove he was engaged in interstate commerce. I didn't have in mind this defense, Your Honor. I have told the Court that I received these medical cards within about a week prior to this—to this time this case was started and didn't even decide to file this plea until that time; and Mr. Danner—I asked Mr. Danner to get these, as he testified, and he testified that they got into my hands about a week or ten days before [fol. 1612] the trial began.

Now, as far as the stipulation is concerned, our court has held, and all courts have held, Your Honor, that in a case of this kind where there was no intention on the part of counsel to stipulate themselves out of court, the Court would set it aside if it is inadvertent.

I am reading from Cole vs. State Compensation Commis-

sioner, 114 W. Va. 633—I am reading the syllabus: "A stipulation of counsel may be set aside, upon the request of one of the parties, on the ground of improvidence provided both parties can be restored to the same condition as when the agreement was made."

Well, now, they are not prejudiced in any way. I am willing to concede, and do concede, that he is engaged in interstate commerce and was on the payroll; but I am just not willing to concede and stipulate myself out of court, and I don't think the Court should take that construction of it.

Another case, the case of Brast vs. Winding Gulf Colliery Company, 94 Federal 2d 179, syllabus one:——

The Court: 94 Federal 2d what?

Mr. Sanders, Sr.: Yes, sir.

Mr. Shaffer: 179.

[fol. 1613] Mr. Sanders, Sr.: (Continuing)—syllabus two, I mean—no, syllabus three—I'll get it right: "One inadvertently signing a stipulation may be relieved where there is no prejudice to the opposite party."

How can this Court believe for one minute that I intended to deliberately enter into a stipulation knocking ourselves out of court? I think the Court should consider the purpose of it: to accommodate Mr. Burton so he wouldn't have to bring in evidence and show that this man was engaged in interstate commerce, which involved some trouble and which no doubt was in his mind at the time. And I think the Court should take that view of it.

Mr. Sanders, Sr., thereupon completed his reply to Mr. Walter G. Burton's argument in opposition to said motion to direct a verdict in favor of the defendant.

The Court: I think the Court can pass on two matters, and I do so now.

This stipulation, it is my recollection about it that you stated in the pre-trial conference—I may be wrong about it, but it is my recollection you stated in the pre-trial conference that you were glad to do that, or you would do that, as a matter of convenience to counsel. And I do not believe you should be precluded from asserting these matters under that stipulation, these matters concerning the [fol. 1614] fraudulent misrepresentations.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

The Court: (Continuing) The matter of employment, I asked—I thought I asked, at least—Mr. Lilly back there—I think I asked him off the record if they were—if their seniority rights continued under re-employment if they had to take a physical examination, and he said they did not. To me, it is what Mr. Sanders says—setting aside a former dismissal and a continuing of that old employment, and they don't require, I think, from the evidence here, physical examinations.

To which action and ruling of the Court the plaintiff, by counsel, at the time excepted.

The Court: (Continuing) Now, the other matters, causal relation, I want to discuss with you, and discuss these cases; and if you will come back at twelve-thirty, I will do that and pass on the other matter. Come back at a quarter of one.

* * * * * * *

[fol. 1615] IN CHAMBERS

STATEMENT BY THE COURT

The Court: I will begin here, gentlemen, by discussing this Eresafe vs. New York, New Haven and Hartford R. Company, 250 Federal 2d 619.

Syllabus three states the general rule: "In order for an employee to be barred of recovery against employer for injuries because of misrepresentations in his application, there must be substantial proof of a direct causal connection between the misrepresentation made at the time of hiring and the subsequent injury to the employee before any defense of fraud can be considered as a bar to a recovery."

On page 620 of this case, the Court says as follows: "In a short 'Discussion' following the Findings of Fact and Conclusions of Law the trial judge stated:

"'Defendant Railroad Company's defense of fraud is without substance since on the facts it is clear that plaintiff's basic misrepresentation as to his true identity was known to it prior to his final acceptance as an employee, and even after knowledge of the misrepresentation came

to the Railroad Company plaintiff was still retained in employment. In fact, even after knowledge of all of the ancil- [fol. 1616] lary misrepresentations came to the attention of the Railroad Company in preparation for and at the trial, the testimony of the Railroad Company's supervisor of employment interviewers was to the effect that the Railroad would not fire him even then. The fact that all plaintiff's misrepresentations, taken together, had no causal relation to his injuries further supports this conclusion.' "

On page 621, the Court says: "Plaintiff testified that he had had no infirmity or illness for six years before his employment by defendant. He also testified that he did not know he had either of the above ailments. He was twenty-eight years old at the time of the trial, October, 1956. The evidence shows, and the judge so held that all of plaintiff's misrepresentations, taken together, had no causal relation to his injuries."

Further on down in the opinion, the Court says: "The sole cause of the injury was the defective grab iron. There was no causal relationship between the misrepresentations and the injuries sustained."

Further on, the Court says: "Defendant did not produce the examining doctor at the trial. There was no proof that if the doctor had known of plaintiff's prior injuries he would not have passed him."

Then it concludes: "A humane and realistic policy in such cases requires substantial proof of a direct causal [fol. 1617] connection between the mispresentations made at the time of hiring and the subsequent injury to the employee, before any defense of fraud can be considered as a bar to a recovery." Citing Phillips vs. Southern Pacific Company, and Blanton vs. Northern Pacific Railway Company, with the citations given.

In Jesse Q. Casso vs. Pennsylvania Railroad Company, syllabus—cited in 219 Federal 2d 303, syllabus four: "Where plaintiff had worked for defendant railroad for more than two years before he sustained injury, and had taken physical examination at time of employment, wherein defendant's doctor determined that he had 20-30 vision in each eye, defense of fraud was not available against plaintiff's action under Federal Employers' Liability Act, even though plaintiff had allegedly misrepresented in applica-

tion blank that he had never had a surgical operation, whereas he had in fact had an eye removed."

The Court says on page 304 of its opinion: "There is some doubt whether the plaintiff had not been hired and put to work for the defendant, glass eye and all, before this application was filled in. If this were the situation it is quite clear that the defendant could not be heard to say that it was deceived by anything said by the plaintiff. We do not rest the case upon this point however. The evidence concerning when employment actually began was not sun [fol. 1618] clear and was, therefore, the type of question which would have to be settled by submitting it to the trier of the fact"—that is the jury.

"Without this point, however, we think the case on this question of fraud is perfectly clear and in the plaintiff's favor. This man was one of a group of seventy-five or more secured for railroad employment at one time by an agency known as the Peter Pan Employment Company. They went through an examination by the railroad's doctor who is now dead. His report stated 20-30 vision by the plaintiff for each eye. The plaintiff says that all the examination consisted of was a direction by the physician to read something from a card. At any rate, the documentary evidence shows that the plaintiff was certified as having 20-30 vision in each eye while the fact, now claimed by the railroad and admitted by the plaintiff, is that one of his eyes was a glass substitute."

The Court then further on in its opinion cites—refers to two cases: "We think the Ninth Circuit in Southern Pacific Company v. Libbey, 199 Fed. 2d 341 has made a good statement of the criterion which it in turn took from the Supreme Court decisions on this point." Citing Minneapolis, St. Paul and S. S. M. R. Co. vs. Rock, supra, and Minneapolis, etc. R. Co. v. Borum, 286 U. S. 447. "One who has procured his employment by fraud may not recover 'providing the false statement was of such character that [fol. 1619] "it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition." ' Applying that criterion to the examining physician here the result is too obvious to need elaboration."

Further on in the opinion they quote from Restatement,

Torts: "The recipient in a business transaction of a fraudulent misrepresentation is not justified in relying upon its truth if its falsity is obvious."

Talarowski vs. Pa. Railway Company, 135 Federal Supplement 503, reiterates again that statement which is announced in the previous case, that if the employment is procured by reason of fraudulent statements and they are relied upon and are of such a character as to have been a substantial factor in the hiring, he is not entitled to these provisions under the Federal Employers' Liability Act.

In Southern Pacific Company vs. Libbey, 199 Federal 2d 341, the Court says at page 348: "It is not questioned by either side that one who procures his employment by fraud is not entitled to the benefits of the Employers Liability Act," citing again Minneapolis, etc. Railway Company case against Rock, "providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition. It is plain that had the re-[fol. 1620] jected testimony been received,"—the Court there didn't permit it—"the jury might well have found the existence of what some courts have referred to as a 'causal' relation between the fraud and the injury in two respects. First, had the court permitted the appellant to prove by the doctor that the latter relied upon the truth of statements in passing Libbey, it is apparent that were it not for the false statements Libbey would not have been an employee and his injuries and this suit would not have resulted."

Minneapolis, St. Paul R. Company vs. Rock—I don't have the citation here; I have referred to it once or twice before; I take it you (to the reporter) have it there——

Mr. Sanders, Sr.: 73 Law Edition; I don't know what the page is.

The Court: 286 U. S. 447. The Court—this is taken from the Lawyer's Edition that I have—at page 412, Headnote 4: "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty.

Petitioner had a right to require applicants for work on [fol. 1621] its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.

"Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public [fol. 1622] policy." Citing several cases.

Payne and others vs. Daugherty, a 1922 case, cited in 283 Federal Reports 353. There is no discussion in that case. I don't exactly understand it. I take it, it was under a prior act. It simply stated that the defendant procured employment by fraudulent misrepresentations as to his former employment and prior injuries; that this was not available in view of the terms of Section 1 and 5 of the former act.

Minneapolis, St. Paul, and some other name Railway Company vs. Borum, 286 U. S. 447. Here there was a mere misrepresentation of age. The evidence did not show plaintiff's false statement—his false statement of his age—substantially affected the examining physician's conclusion that the plaintiff was in good health and acceptable physical condition, or that had he given his correct age that the physi-

cian would have found different. The Court said that Dawson was an employee within the meaning of the Federal Employers' Liability Act at the time injured. It was conclusively shown that he was physically and mentally sound, thoroughly competent to perform the duties required of him by the defendant.

The Court distinguished this from the Rock case, and it says this: "Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the de- [fol. 1623] fendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees."

Newkirk vs. Los Angeles Junction Railway Company, a California case, 131 Pacific 2d 535. The employee fraudulently represented his age as forty-four when he was in fact sixty-three. It was shown in the evidence that he was agile and climbed around over the box cars like a squirrel; no one turned him in for any infractions; and no causal connection was shown between his misrepresentations and his injuries.

The Court says at page 543: "Where the employment is induced by fraudulent representations of employee not going to the factum of the contract the employment exists although there may be ground for rescinding the contract and recovery may be had from the employer for negligent injury to the employee, at least where there is no causal connection between the injury and the misrepresentation."

Matthews vs. Atchison, T. and S. F. Railway Company, another California case, 129 Pacific 2d 435. The employee was employed as a switchman. He gave false name in his application; stated his age was forty-one when it was in fact fifty-three. He misrepresented the fact that he had been discharged several years before for breach of rules. But thy held that it does not appear that the plaintiff's age had anything to do with the occurrence of the accident; [fol. 1624] that no causal connection was shown between the injury and the misstatements in the application for employment. He passed the physical examination and served two years, and worked two years; his services were satisfactory; his age didn't interfere with the performance of his duties.

The Court says: "He was not beyond the age of agility. It does not appear from the evidence that the defendant would not permit persons of plaintiff's actual age to do for

it work plaintiff was doing, if they had been previously employed, but merely that they would not be taken on as new employees."

Phillips vs. Southern Pacific Company, a California case, 58 Pacific 2d 688, syllabus four: Switchman's concealment of his having been discharged from previous railroad employments and applying for the job under the name of the —of his brother, does not preclude recovery for injuries sustained through fall from freight car occasioned by alleged negligence of railroad, in absence of showing of a causal connection between false representation and accident.

Laughter vs. Powell, a North Carolina case, 14 S. E. 2d 826. This case reviews many of these Federal Employers' Liability cases and does so in good fashion. A boy here nineteen represented himself to be twenty-one. He violated the company's regulations concerning that of employing minors in train service; that he would not have [fol. 1625] been employed—the evidence was to the effect that he would not have been employed had they known about it. They found that the plaintiff was physically and mentally fit to do the work of trainman, and employee within the meaning of act, and no causal connection shown.

Dawson vs. Texas & P. Railway Company, a Texas case, 70 S. W. 2d 392. When Dawson applied for employment he was in every way physically fit to perform the duties of his employment. He performed these duties for twelve years in a satisfactory manner before the injury. And the Court said that the fact that he concealed his employment with another railroad company, the fact that he was injured in this other company and had filed suit against it, did not preclude him from the benefits of the Federal Employers' Liability Act. They reiterated in this case that no causal connection was shown between the injury and the false statements in the application.

Now, gentlemen, the evidence—I think it's clear from these cases that if these representations go to the factum of the contract, if they are on material matters, if he had given these correct answers they would have been relied on, would not have given him employment had they been truthfully answered and had the Railway Company known about them, I think he is precluded.

I can't imagine a stronger case of direct causal connection between the misrepresentations and the injuries com- [fol. 1626] plained of than we have in this particular case. Here's a man who, I think the evidence completely shows, had had this spondylolisthesis—that his spondylolisthesis, or however you pronounce it, condition was congenital or at least he had had it for a number of years. I think it was his duty to have revealed that condition to the Railway Company, and particularly so in view of the fact that he knew about this condition. He received a discharge from the Army; he was in the hospital in the Army; he applied for a pension; he was examined by a number of doctors. This testimony introduced here before the Court and the jury of the Veterans Administration records shows conclusively that he knew of this back condition, and I think he had a duty certainly to reveal that condition, and had it been known, the Company wouldn't have employed this man.

Now, I do realize the spot it places you gentlemen in. I certainly have no desire to direct a verdict in any of these cases; but every time I fail to direct a verdict, it comes right straight back and smacks me in the face. This is beautifully exemplified in two cases recently tried, Barnett against Bailey. I failed to direct a verdict when I should have. It now means I am going to have to re-examine, reread and digest all the law in West Virginia and write an opinion in that case, because it's an important matter, and I consider it my duty to do it.

In the case Mr. Sanders mentioned, we tried it here for [fol. 1627] several days, and I didn't direct a verdict. Well, it was about the same evidence the second time it came on and I did direct a verdict.

Now, you gentlemen were taken as much by surprise in this case as all these doctors, and doctors from the Railroad. This man didn't even tell you his back—he had a bad back condition. It is very obvious that you didn't know that until very late in this trial. I do like my lawyers and have a lot of hesitancy in directing any of these verdicts, but I don't have any sympathy for Carl Still in this case because I think he has lied completely all through this case.

I do regret having to take such action, but I am satisfied of this, that it will be a waste of time not to do so. I am

satisfied I would then have to write an opinion, and, as these cases hold, I think—they are very clear to me—that where they go to the materiality of the matter and there is a causal connection shown, that he is not an employee. I think this case is very close to the one where he gets some other person to fill out his application. He just doesn't tell the truth about any of these things which are most material.

I'll give you gentlemen a stay or anything that you desire in the matter.

Mr. Walter G. Burton: Well, we are in this position, [fol. 1627½] Your Honor—as I understand, you are striking it, now, on the grounds that he obtained his employment on July 24th, 1951, by fraud and misrepresentation; that's the grounds you are doing it on?

The Court: Yes, sir.

Mr. Walter G. Burton: Counsel for the plaintiff objects to the Court and excepts to the Court directing the jury to find a verdict for the defendant in this case.

. . . . . .

IN THE COURT ROOM

(IN THE PRESENCE OF THE JURY)

. . . . . .

[fols. 1628-1629] VERDICT

The Court to the Jury: Ladies and gentlemen of the jury, I now hand you a form verdict which has been prepared: "We the jury at the direction of the Court, agree and find for the defendant." One of your number will sign that. And it is at the direction of the Court.

The technical objections were raised in this case in a Special Plea in the evidence that Carl Still had made certain fraudulent representations in his application for employment and to the doctors, the N. and W. Railway Company. It is not necessary and I am sure this jury wouldn't be interested in the Court going into discussing the legal cases involving the Federal Employers' Liability Act under which this case was brought. The Court has now seen fit to ratify the motion made by Mr. Sanders, to grant the motion and direct this verdict.

I do thank you—will you have one of them sign it? Will one of your number sign it as foreman? Any one of you sign it.

The form verdict was thereupon signed by James E. Thomas, a juror on this panel.

Mr. Wiley, the Deputy Clerk: "We the jury at the direction of the Court, agree and find for the defendant. James E. Thomas, Foreman."

. . . . . .

[fols. 1630-1670] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1671] PLAINTIFF'S EXHIBIT No. 21

Bluefield Yard Brakeman Carl Still—Dismissal—

10-13-59.
November 8, 1957.
File T-7751.

Mr. K. H. Jones, General Chairman,
Brotherhood of Railroad Trainmen,
501-2 Boxley Building,
Roanoke, Virginia.

DEAR SIR:

Referring to previous correspondence, your File No. 2238-A-23-533, and conference discussion today concerning your request for "reinstatement to the service with seniority rights unimpaired of Yard Brakeman Carl Still, dismissed November 13, 1956, with pay for all time lost in connection with this matter, Bluefield Yard".

During the conference we advised you that we would, as a matter of leniency, be willing to give Yard Brakeman Still another chance, and reinstate him to service with seniority unimpaired, provided, of course, he satisfactorily passes the examination for vision, hearing and color perception, and with the further understanding that he will not be granted a vacation during the year 1957. We will arrange accordingly.

During the conference you withdrew claim for "pay for all time lost in connection with this matter".

Yours truly, H. C. Wyatt, Vice President and General Manager.

B/C

WAN—The above in line with our conversation today.
H.C.W.

Cy: PCW—Mine May 20. Please arrange accordingly.
WANoell—11/11/57.
BGL—Mine May 21st. Please arrange accordingly.
P.C.Wingo—11/14/57 a

[fol. 1672] PLAINTIFF'S EXHIBIT No. 22

Investigation to determine responsibility in connection with Yard Brakeman Carl Still deserting his crew, Bluefield Yard, October 25, 1956—Yard Brakeman Carl Still—Dismissed—
10-13-59.

November 13, 1956

Mr. Carl Still,
Yard Brakeman.

DEAR SIR:

You have been dismissed from the service for deserting your crew and failure to properly perform your duties in violation of Rule 404, Book of Rules, on Bluefield Yard, October 25, 1956.

Yours truly, P.C. Wingo, Superintendent.

B/C BGL—Yours Nov. 5th. Please deliver original to Still.

[fols.1673-1676] PLAINTIFF'S EXHIBIT No. 23

10-13-59.

Bluefield—November 18, 1957 a

Mr. B. G. Lilly,
Terminal Trainmaster, N&W Railway Company,
Bluefield, West Virginia.

I fully understand that my being reinstated as yard brakeman on Bluefield Yard will not entitle me for time lost prior to this date, nor will I be allowed vacation or paid therefor until after I have properly qualified, following my reinstatement.

I also understand that I have no monetary or other claims against the Norfolk and Western Railway Company.

Carl Still.

Witness F. J. Allen.

[fol. 1677] DEFENDANT'S EXHIBIT No. 3

1366
Discharge 4 403
[Type illegible——ed to Record ——Feb. 12, PM 1:29.——
W. Va.]

ARMY OF THE UNITED STATES

HONORABLE DISCHARGE

This is to certify that CARL STILL 35 997 093 Private, Company D, 1st Battalion, Army Service Forces Personnel Replacement Depot, Army of the United States, is hereby Honorably Discharged from the military service of the United States of America.

This certificate is awarded as a testimonial of Honest and Faithful Service to this country.

Given at: Camp Beale, California.

Date: 31 January 1946.

West Virginia: The County Court of McDowell County, Clerks Office. February 11, '46, the foregoing writing with certificate thereto, was this day presented in said office and duly admitted to record. Teste: D. S. Renn, Clerk. By Elizabeth H. Mentz, Deputy.

Charles W. Comfort, Jr., Colonel, Medical Corps.

[fol. 1677a] ENLISTED RECORD AND REPORT OF SEPARATION

HONORABLE DISCHARGE

1. Last Name, First Name, Middle Initial: Still, Carl.
2. Army Serial No.: 35 997 093;
3. Grade: Pvt.
4. Arm or Service: MD.
5. Component: AUS.
6. Organization: Company D, 1st Battalion, Army Service (55).
7. Date of Separation: 31 Jan. 46.

8. Place of Separation: Camp Beale, California.

9. Permanent Address for Mailing Purposes: 229 Vine St., Bluefield (Mercer), West Virginia.

10. Date of Birth: 17 May 26.

11. Place of Birth: Arista, West Virginia.

12. Address from Which Employment Will Be Sought: See 9.

13. Color Eyes: Brown.

14. Color Hair: Black.

15. Height: 5′ 8½″.

16. Weight: 171 lbs.

17. No. Depend.: 3.

18. Race: Negro.

19. Marital Status: Single.

20. U. S. Citizen: Yes.

21. Civilian Occupation and No.: Laborer, 9-22.20.

MILITARY HISTORY

22. Date of Induction: 18 Jul 45.

23. Date of Enlistment: ——.

24. Date of Entry into Active Service: 18 Jul 45.

25. Place of Entry into Service: Huntington, West Virginia.

SELECTIVE SERVICE DATA

26. Registered: Yes.

27. Local S. S. Board No.: 1.

28. County and State: McDowell, West Virginia.

29. Home Address at Time of Entry into Service: See 9.

30. Military Occupational Specialty and No.: Sanitary Technician, 196.

31. Present Qualification and Date (*i.e.*, infantry, aviation, and marksmanship badges, *etc.*): Marksman, Rifle '17, 7 Sep 45.

32. Battles and Campaigns: None.

33. Decorations and Citations: World War II Victory Medal.

34. Wounds Received in Action: None.

Application for Readjustment Allowances made through W. Va. Department of Unemployment Compensation on Date: Feb. 20, 1946.

35. Latest Immunization Dates: Typhoid—No Record; Other (specify)—None.

36. Service Outside Continental U. S. and Return: None.

37. Total Length of Service: Continental Service—0 Years, 6 Months, 14 Days; Foreign Service—0 Years, 0 Months, 0 Days.

38. Highest Grade Held: Private.

39. Prior Service: None.

40. Reasons and Authority for Separation: Certificate of Disability for Discharge; UP Section I AR 615-361.

41. Service Schools Attended: None.

42. Education (Years): Grammar—8, High School—0, College—0.

Pay Data

43. Longevity for Pay Purposes: 0 Years, 6 Months, 14 Days.

44. Mustering Out Pay: Total—$200.00; This Payment—$100.00.

45. Soldier Deposits: None.

46. Travel Pay: $137.50.

47. Total Amount: $237.50; Name of Disbursing Officer: Wm. A. Sarcander, Lt. Col. FD.

Insurance Notice

Important: If premium is not paid when due or within thirty-one days thereafter, insurance will lapse. Make checks or money orders payable to the Treasurer of the U. S. and forward to Collections Subdivision, Veterans Administration, Washington 25. D. C.

48. Kind of Insurance: Nat. Serv.

49. How Paid: Allotment; Direct to V. A.

50. Effective Date of Allotment Discontinuance: 31 Jan. 46.

51. Date of Next Premium Due (One month after 50): 28 Feb. 46.

52. Premium Due Each Month: $6.50.

53. Intention of Veteran to: Continue.

54. Right Thumb Print.

55. Remarks (This space for completion of above items or entry of other items specified in W/D Directives): (6) Forces Personnel Replacement Depot, 1918 SCU, ASR Score (2 Sep 45) 2, Lapel Button Issued.

56. Signature of Person Being Separated: s/ Carl Still.

57. Personnel Officer (Type name, grade and organization—signature): Paul V. Anderson, Captain, CAC. Signed, Paul V. Anderson.

WD AGO Form 53-55—1 November 1944.

(This form supersedes all previous editions of WD AGO Forms 53 and 55 for enlisted persons entitled to an Honorable Discharge, which will not be used after receipt of this revision.)

[fol. 1678] DEFENDANT'S EXHIBIT No. 4

Form C. T. 88

(Revised Sept., 1948)

NORFOLK AND WESTERN RAILWAY COMPANY

Note: Each question must be answered fully by applicant in own handwriting.

Application for Employment as: Yard Brakeman at Bluefield, W. Va.

1. Name in Full (First, Middle, Last): Carl —— Still; Age: 25.

2. Date of Birth (Month, Day, Year): May 17, 1926; Place of Birth (Town, County, State): Arista, Mercer, W. Va.

3. Married; Height: 5' 10"; Weight: 190; Telephone No.: 38745 (39912); Address: 613 Yadkin St., Bluefield, W. Va.

4. Name of Wife: Virgie Still.

5. Name of Parents: Lucy Still; Address: 613 Yadkin St.

6. If unmarried and parents are not living, name of nearest relative?: ——; Address: ——; Relationship: ——.

7. Names, relationship and addresses of persons dependent on you for support or to whose support you are contributing: Wife, Mother & Brother.

8. Have you any relatives in the service of this Company?: No; If so, give names, relationship, position and location: ——.

9. Education: Grade School, 9 years; High School, 2 years; College, —— years—If High School graduate, show school name, location and year; if College graduate, show major work, degree and date completed: ——.

10. Give record of all previous employment in date order (include service with this Company, if any): Name of Employer—Peerless Coal Co.; Town or City, and State where Employed—Vivian, W. Va.; Occupation: Miner, Brakeman; From 11-1948 To 7-1951; Reason for Leaving: To get job with Railroad.

11. Give Military service and state whether honorably or dishonorably discharged or given a medical discharge: U. S. Army; honorable discharged.

12. Name the Federally recognized unit (National Guard or Reserve Corps) you are a member of and date you joined it: None.

13. In connection with any previous application for employment were you subjected to a physical examination?: Yes; If so, when, where, and by whom was examination made? If rejected, state cause of rejection: Dr. Murray: Excepted.

14. Have you ever been injured? If so, when and at

what place: No; How did it occur?: ——; Extent of injuries: ——.

15. Have you ever had a fit or unconscious spell of any kind?: No.

16. Do you use or have you ever used intoxicating liquors or morphine, opium, or any other habitforming drugs?: No; If so, to what extent?: ——.

17. What is the general condition of your health at present?: Good.

18. Have you ever been convicted of a crime?: No; If so, state what crime(s), date(s), place(s) of conviction(s) and sentence(s) imposed: ——.

I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company.

19. Character References (give three, not relatives):

Name: Dr. Higginbotham; Address: Bluefield, W. Va.
Name: Fisher Hooser; Address: Bluefield, W. Va.
Name: Greate Alexander; Address: Bluefield, W. Va.

Social Security Account No. 233-40-5717.
Dated at: Bluefield this 24 day of July, 1951.
Witness: Frank J. Allen; Sign name in full: Carl Still.

[fol. 1078a] NORFOLK AND WESTERN RAILWAY COMPANY

Bluefield, July 24, 1951.

I have this day filled out Form C. T. 88 which is my application for employment as Yard Brakeman by the Norfolk and Western Railway Company, and I hereby agree that my application is not complete unless and until I shall have passed a physical examination satisfactory to said Company.

I also agree that if I be put into service, prior to such physical examination, then and in that event, if said physical

examination is not found satisfactory my continued employment by said Company shall be terminated.

I further agree to bear any expense incurred by me or loss of time brought about in making myself available for this physical examination under the direction of the said Company.

Carl Still.

Witness: Frank J. Allen, Clerk.

Comments by party, with whom application is filed, on applicant's appearance and suitability for position sought: This man has worked in mines and dropped cars around tipple, also neat and clean in appearance.

Signature: R. F. Berry.
Title: Terminal Trainmaster.

Approved: P. C. Wingo, Superintendent.
Date: 7/26 1951.

[fol. 1679] DEFENDANT'S EXHIBIT No. 5

R. P. M. declined: Why: May apply later.

Norfolk and Western Railway Co.

Physical Examination for Employment Only

Statement of Applicant to Medical Examiner

Name: Still, Carl (none).
Residence: Bluefield, W. Va.
Occupation applied for: Yd. Brakeman.
Div.: Poca.
Dept.: C.T.
When and where born: 5/17/26, Arista, W. Va.
Name of Father: Edd (dead).
Name of Mother: Lucy.
Wife: Virgie.
Brothers: Gaines, John, Paul, Bruce.

Sisters: Eva, Kate, Ruby.
Children: None.
Have any of the above had Tuberculosis or Insanity? No.
Have you ever had:

Hernia? No.
Pleurisy? No.
Stricture? No.
Asthma? No.
Varicose Veins? No.
Appendicitis? No.
Urinary troubles? No.
Syphilis? No.
Dyspepsia? No.
Bronchitis? No.
Dysentery? No.
Hay Fever? No.
Dizzy or Fainting Spells? No.
Pneumonia? No.
Gonorrhea? No.
Piles? No.
Spitting Blood? No.
Rheumatism? No.
Sunstroke? No.
Diabetes? No.
A fit or unconscious spell? No.
A nervous breakdown or any form of insanity? No.
A medical discharge from the military service? No. (Honorable)
Have you ever had a long or serious illness? No.
What injuries have you ever received? No.
Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? No.
If Former Employe, where employed? No Previous Employment.
Have you been previously examined for employment, if so, when, where, and by whom was examination made? If rejected, state cause of rejection. None.
Remarks: None.
Place and date: Bluefield, W. Va., 7/24/51.

Witness: H. E. Troup, M.D., Medical Examiner.
Signature of Applicant: Carl Still.

[fol. 1679a] MEDICAL EXAMINER'S CERTIFICATE

Intelligence: Average.
General Development: Average.
Height: 5 ft. 10.
Weight: 177.
Chest (Insp.: 41½ in. (Exp.): 38 in.
Waist measure: 32.
Race: Negro.
Nationality: American.
Sex: Male.
Complexion: Black.
Hair: Black.
Eyes: Brown.
Hearing, Rt.: 20 ft. Left: 20 ft.
Vision, Without Glasses Rt.: 20/20. Left: 20/20.
Note any defects in the:
Hands and arms: ✔
Feet and legs: ✔
Head, Face and Neck: ✔
Eyes and Eyelids: ✔
Spine and Joints: ✔
Groin: ✔
Skin: ✔
Blood Vessels: ✔
Hernia: ✔
Varicocele: ✔
Patulous Rings: ✔
Heart:
Pulse Rate: 72.
Character Pulse: Regular.
Position Apex Beat: Normal.
Auscultation: Normal.
Lungs:
No. Respirations: 15.
Character of: Full.
Percussion: Normal.
Auscultation: Normal.
Blood Pressure: 114/72.
Urinalysis: Alb., Neg. Sugar, Neg.
Cachexia: ✔
Diathesis: ✔

Remarks: None.
If rejected, Cause:

I do hereby — approve applicant as physically — qualified.
Place and Date of Examination: Bluefield, W. Va., 7/24/51.

H. E. Troup, M.D., Medical Examiner.

[fol. 1680] DEFENDANT'S EXHIBIT No. 6

NORFOLK AND WESTERN RAILWAY COMPANY

Note: Each question must be answered fully by applicant in own handwriting.

Application for Employment as Laborer, Sec. #1 at Bluefield, W. Va.

1. Name in Full (First, Middle, Last): Carl —— Still; Age: 22.

2. Date of Birth (Month, Day, Year): May 17, 1926; Place of Birth (Town, County, State): Arista, Mercy, W. Va.

3. Name of wife, if living (if unmarried, so state): Virgie Mae Still.

4. Name of father, if living: ——; Residence: ——.

5. Name of mother, if living: Lucy Still; Residence: 613 Yadkin St., Bluefield, W. Va.

6. If unmarried and parents are not living, name of nearest relative?: ——; Address: ——; Relationship: ——.

7. Names and addresses of persons dependent on you for support or to whose support you are contributing: (Mother) Lucy Still, (Bro.) Bruce Still, (Wife) Virgie Mae Still, 613 Yadkin St., Bluefield, W. Va.

8. Education: Grade School, 6 years; High School, 4 years—if graduate, show school name and location and year: ——; Other education: Auto-Mechanic.

9. Give record of all previous employment in date order (include Military service, if any): Name of Employer—U. S. Coal & Coke; Town or City at Which Employed—Gary; State—W. Va.; Occupation—Brakeman; From Sept., 1944 to March, 1945; Name of Employer—Vera Pocahontas; Town or City at Which Employed—Landgraff; State—W. Va.; Occupation—Coal loader; From Nov. 1942 to Sept., 1944.

10. Have you ever been injured? If so, when and at what place: None; How did it occur?: None; Extent of injuries?: None.

11. Do you use or have you ever used intoxicating liquors or any drugs such as morphine, opium, etc.?: No; If so, to what extent?: ——.

12. If employed at present, by whom?: No; No.: ——; Street: ——; Town or City: ——; State: ——; In what capacity are you employed?: ——.

13. If not employed at present, why did you leave your last place?: Finish School.

14. Have you ever been in the employ of this railroad before?: No; If so, state when, in what capacity, on what division, and cause of leaving?: ——.

15. Have you ever before made application for employment and been subjected to a physical examination?: No; If so, when: ——; where: ——; and by whom was the examination made?: ——; Were you accepted or rejected?: ——.

16. Have you any relations in the service of this Railroad?: No; If so, give names, relationship, position and location: ——.

17. My health is: good; my hearing is: good; and eyesight: good; and I: am able to distinguish colors.

18. Will you inform yourself as to the location of bulletin boards, books, etc., regularly read the Special Notices, orders and instructions posted thereon or contained therein, and comply with them?: Yes.

19. Will you promptly inform yourself as to the location of all structures or objects (including tunnels and bridges) where you work that may be near the tracks, engines or cars and not put yourself in a position to be injured by same?: Yes.

20. Will you carefully study the rules of this Company?: Yes.

Sign name in full: Carl Still.
Social Security Account No.: 233-40-5717.
Address: 613 Yadkin Street, Bluefield, W. Va.

Witness: Woodrow W. Makey.
Dated at: Bluefield, W. Va. this 27 day of Sept., 1948.

[fol. 1681] DEFENDANT'S EXHIBIT No. 7

R. P. M. declined: Why: Will if work is permanent.

Norfolk and Western Railway Co.

Physical Examination for Employment Only

Statement of Applicant to Medical Examiner

Name: Still, Carl.
Residence: Bluefield, W. Va.
Occupation applied for: Sec. Laborer.
Div.: Poca.
Dept.: M.W.
When and where born: 5/17/26, Arista, W. Va.
Name of Father: Edd (dead).
Name of Mother: Lucy.
Wife: Virgie.
Brothers: Gaines, John, Paul, Bruce.
Sisters: Kate, Eva, Ruby.
Children: None.
Have any of the above had Tuberculosis or Insanity? No.
Have you ever had:

Hernia? No.
Pleurisy? No.

Stricture? No.
Asthma? No.
Varicose Veins? No.
Appendicitis? No.
Urinary troubles? No.
Syphilis? No.
Fits? No.
Dyspepsia? No.
Bronchitis? No.
Dysentery? No.
Hay Fever? No.
Dizzy or Fainting Spells? No.
Pneumonia? No.
Gonorrhea? No.
Piles? No.
Spitting Blood? No.
Rheumatism? Age 14.
Sunstroke? No.
Diabetes? No.
Have you ever had a long or serious illness? Usual childhood, none else.
What injuries have you ever received? No.
Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? No.
If Former Employe, where employed? No.
Have you been previously examined for employment? No.
For Relief Fund membership? No.
Remarks:
Place and date: Bluefield, W. Va., 9/27/48.

Witness: Roy E. Christie, M.D., Medical Examiner.
Signature of Applicant: Carl Still.

10-8-59.

[fol. 1681a] MEDICAL EXAMINER'S CERTIFICATE

Intelligence: Good.
General Development: Good.
Height: 5-11.
Weight: 169.
Chest (Insp.): 38 in. (Exp.): 34 in.
Waist measure: 33.
Race: Colored.

Nationality: American.
Sex: Male.
Complexion: Med.
Hair: Black.
Eyes: Brown.
Hearing, Rt.: 20. Left: 20.
Vision, Without Glasses Rt.: 1/14 20/20. Left: 1/14 20/20.
Note any defects in the:
Hands and arms: No.
Feet and legs: No.
Head, Face and Neck: No.
Eyes and Eyelids: No.
Spine and Joints: No.
Groin: No.
Skin: No.
Blood Vessels: No.
Hernia: No.
Varicocele: No.
Patulous Rings: No.
Heart:
Pulse Rate: 71.
Character: Normal.
Position Apex Beat: Normal.
Auscultation: Normal.
No. Respirations: 18.
Character of: Normal.
Percussion: Normal.
Auscultation: Normal.
Blood Pressure: 114-68.
Cachexia: ——.
Diathesis: ——.

I do hereby approve applicant as physically qualified.
Place and Date of Examination: Bluefield, W. Va., 9/27/48.

Roy E. Christie, M.D., Medical Examiner.

[fol. 1682] DEFENDANT'S EXHIBIT No. 8

R. F. M. declined: Why: Temporary employment

Norfolk and Western Railway Co.

Physical Examination for Employment Only

Statement of Appellant to Medical Examiner

Name: Still, Carl.
Residence: Landgraff, W. Va.
Occupation applied for: Track Laborer.
Div. or Shop: Poca.
Dept.: M.W.
When and where born: 5/17/26, Arista, W. Va.
Name of Father: Edward (dead).
Name of Mother: Lucy.
Wife: Single.
Brothers: John, Paul, Bruce, Gaines.
Sisters: Kate, Ruby, Eva.
Children: ——.
Have any of the above had Tuberculosis or Insanity: No.
Have you ever had:

Hernia? No.
Pleurisy? No.
Stricture? No.
Asthma? No.
Varicose Veins? No.
Appendicitis? No.
Urinary troubles? No.
Syphilis? No.
Fits? No.
Dyspepsia? No.
Bronchitis? No.
Dysentry? No.
Hay Fever? No.
Dizzy or Fainting Spells? No.
Pneumonia? No.
Gonorrhea? No.
Piles? No.
Spitting Blood? No.
Rheumatism? No.
Sunstroke? No.

Diabetes? No.
Have you ever had a long or serious illness? No.
What injuries have you ever received? No.
Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? No.
If Former Employe, where employed? No.
Have you been previously examined for employment? No.
For Relief Fund membership? ——.
Remarks: ——.
Place and date: Bluefield, W. Va., May 25, 1943.

Witness: J. C. Gordon, M.D., Medical Examiner.
Signature of Applicant: Carl Still.

10-8-59.

[fols. 1682a-1685] MEDICAL EXAMINER'S CERTIFICATE

Intelligence: Good.
General Development: Good.
Height: 5-9.
Weight: 164.
Chest (Insp.): 39 in. (Exp.): 36 in.
Waist measure: 34.
Race: Colored.
Nationality: American.
Sex: Male.
Complexion: Colored.
Hair: Black.
Eyes: Brown.
Hearing, Rt.: 20/30. Left: 20/30.
Vision, Without Glasses Rt.: 20/20. Left: 20/20.
Note any defects in the:
Hands and arms: ✔
Feet and legs: ✔
Head, Face and Neck: ✔
Eyes and Eyelids: ✔
Spine and Joints: ✔
Skin: ✔
Blood Vessels: ✔
Hernia: ✔
Varicocele: ✔
Patulous Rings: ✔
Heart:

Pulse Rate: 70.
Character Pulse: Reg.
Position Apex Beat: Normal.
Auscultation: Normal.
No. Respirations: 18.
Character of: full.
Percussion: Normal.
Auscultation: Normal.
Blood Pressure: 105-50.
Chachexia: Neg.
Diathesis: Neg.

I do hereby approve applicant as physically qualified.
Place and Date of Examination: Bluefield, W. Va. 5/25.

J. C. Gordon, M. D., Medical Examiner.

[fol. 1686] DEFENDANT'S EXHIBIT NO. 12

10-9-59.

CERTIFICATE OF DISABILITY FOR DISCHARGE

Report of Board of Medical Officers (Met Under Provisions of Section II, AR 615-380)

1. Name: Still, Carl.
2. Army Serial Number: 35 997 093.
3. Grade: Pvt.
4. Date of Board Meeting: 29 January 1946.
5. Last permanent organization (Regiment and Arm or Service): Company D 1st Bn ASF PRD 1918 SCU MD.
6. Place of meetings (Station or Hospital): Sta Hosp, Camp Beale, California.
7. After careful consideration of all information obtainable and a critical examination, we find this individual unfit for military service because of: Spondylolithesis, second-degree, severe, secondary to congenital defects of lumbo-sacral junction. Manifested by chronic pain in lower back. Soldier cannot be rehabilitated to perform effective military service. Will be discharged to own care.

Date of onset of disease or injury: 1941.

Date became unfit for duty (enter one date): 10 January 1946.

Aggravated by active service: No.
Incurred while AWOL: No.
Existed prior to entering into service: Yes.
Incident to service: No.
Incurred in private avocation: Yes.
Due to own misconduct: No.
In line of duty: No.
Remarks (Identify by Box Number)

X-Ray of Chest Has Been Taken Within 90 Days and Report Is Filed in Current Clinical Records

In Accordance With These Findings, We Recommend That Individual Be Discharged

8. President's signature: (Sign Original only).
9. Recorder's signature: (Sign Original only).
10. Third member's signature: (Not Required).
11. Typed name and grade: Mark J. Brockbank, Major, MC.
12. Typed name and grade: Robert O. Lancet, 1st Lt, MC.
13. Typed name and grade (Required): Benjamin F. Klaiman, Major, MC.

Approval C. O. Hospital.

14. Date: 30 January 1946.

Approval: Discharge Authority.

15. Date: 30 January 1946.

Approval:

16. Date: 30 January 1946.
17. Signature: (Sign Original only).
18. Signature: (Sign Original only).
19. Signature: (Sign Original only).
20. Typed name and grade: Charles W. Comfort Jr Col MC, Post Surgeon.
21. Typed name and grade: Marjorie Allen 1st Lt WAC, Assistant Adjutant.
22. Typed name and grade: Marjorie Allen 1st Lt WAC, Registrar.

To the Adjutant General.

23. Date individual entered active service: 18 Jul 45.
24. Prior service, if any: None.

Headquarters: ASF NSC Sta Hosp CP Beale, Calif.
Date: 31 Jan 46.

25. Date of last discharge, if any: Never.
26. If absent from unit when disease was contracted or injury received, state cause, place, and date: Unknown.
27. Date individual was discharged: 31 Jan 46.
28. Discharged at: Camp Beale, California.
29. Honorably: Yes.
30. Other than honorably: (blue).
31. Has individual made pension claim? Yes.
32. Has individual been on foreign duty? No.
33. Does service record show participation in action or in battles, wounds or other injuries received in service? No.

Permanent Address for Mailing Purposes (or Legal Guardian or Veterans' Facility if Further Care Required)

34. Street or R.F.D. Number, City, County and State: 229 Vine Street Bluefield West Virginia.

Individual Was Given Opportunity to Apply for Pension—

Individual Was Furnished With a Discharge Certificate

35. Typed name and grade of personnel officer: Paul V Anderson, Captain CAC, Personnel Officer.
36. Personnel officer's signature: (This signature on copies two and three will serve as certification of true copy).

Paul V. Anderson.

[fol. 1687] DEFENDANT'S EXHIBIT No. 13

6871356

"VETERAN'S APPLICATION FOR PENSION OR COMPENSATION FOR DISABILITY RESULTING FROM ACTIVE MILITARY OR NAVAL SERVICE

For Use Only at Time of Separation from Service

I Hereby Make Application for Compensation or Pension Based on Military or Naval Service in World War II.

1. Last Name: Still; First Name: Carl; Middle Name: ——; 229 Vine St., Bluefield, West Virginia.
2. Serial or Service No.: 35 997 093.
3. Nature of Disease or Injury on Account of Which Claim is Made and Date Each Began: Heart flutters, rheumatism in my back and where my bones join together (last part of 1942). Pains in my right side, come from where

I have had my ribs broken (last of 1941); Has got bad since I have been in the Army.

32. I Hereby Certify That I *(have read) (have had read to me) all questions and answers thereto embodied in this application: that answers to all above questions are true and complete to the best of my knowledge and belief: that all available information in support of this application is contained in the foregoing statements which are made as a part thereof with full knowledge of the penal provisions printed below for making a false statement as to a material fact in such application.

Carl Still, Signature of Claimant."

(Stamped)

"Received February 15, 1946, Veterans Adm. Area Office, 8, Dallas."

[fol. 1688] DEFENDANT'S EXHIBIT No. 14

"APPLICATION FOR HOSPITAL TREATMENT OR DOMICILIARY CARE

1. I hereby apply to the Veterans Administration for × Hospital Treatment.

3. Last Name: Still; First Name: Carl; Middle Initial: ——.

4. History of Active Military or Naval Service in × Army; Service Serial No.: 35 997 093; Date Enlisted: 7/18/45; Place Enlisted: Huntington, W. Va.; Date Discharged: 1/31/46.

32. I Agree to accept transfer to another hospital, or my home, if in the opinion of the medical staff of this hospital such transfer is deemed expedient. I understand all questions and answers on this form and the printed provisions on the reverse side hereof, including the penalty provided for making a false statement hereon. The answers to all questions are true and complete to the best of my knowledge and belief.

Carl Still, (Signature of applicant or representative).

33. Subscribed and sworn to before me this 11th day of December, 1950 by Carl Still, claimant, to whom the statements herein were fully made known and explained.

Gaye L. Scott, (Notary Public).

39. Brief History: In 1945, had trouble with back after maneuvers. Was given a Brace by Army Doctors to aid back trouble.

40. Symptoms: Severe in lower back region, which totally disables patient for time being. Causes tremendous discomfort.

42. Diagnosis: Probably spondylolisthesis."

[fol. 1689] DEFENDANT'S EXHIBIT No. 15

10-9-59.
N.U.H.

VETERANS ADMINISTRATION
Mountain Home, Tennessee
December 15, 1950
6004CM1CM

Mr. Carl Still,
613 Yadkin Street,
Bluefield, W. Va.

DEAR SIR:

Your application for hospital care has been received and we regret to advise that the medical findings fail to show definite need of hospital treatment or domiciliary care. If you wish to have your doctor submit additional findings relative to your physical condition and your need for treatment, your case will be given further consideration.

If reply is made attach this letter for our convenience in locating files.

Very truly yours,

C. M. Whitehead, Registrar.

VA FL
AT10-1470.
Jan. 1948.

[fol. 1690] DEFENDANT'S EXHIBIT No. 16

10-9-59.
N.U.H.

File No. C-6,871,356

AWARD OF DISABILITY PENSION
(Service Connected)

Veterans Administration Area Office No. 8

March 21, 1946

To: Mr. Carl Still,
229 Vine St.,
Bluefield, West Virginia.

In accordance with the provisions of Public Law No. 2, 73rd Congress, as amended, you are hereby notified that as a beneficiary who was discharged from the army service of the United States on the 31st day of January, 1946, you are awarded pension in the amount of $11.50 from February 1, 1946, on account of disability resulting from the following conditions held to have been incurred or aggravated during your World War II Service: Spondylolisthesis.

It has been determined that service connection is not shown for the following conditions: None.

The monthly payments pursuant to this award will continue during the period in which you are 10% disabled subject to the general conditions mentioned on the reverse side of this communication to which your attention is directed. Upon the happening of any of the contingencies mentioned the Veterans Administration should be notified promptly.

There is enclosed a Form 1900, Application for Vocational Rehabilitation, for your use in the event it is believed vocational rehabilitation is necessary to overcome the handicap of your service-connected disabilities. If you desire to apply for vocational rehabilitation the completed Form 1900 should be forwarded to the office of the Veterans Administration having permanent custody of your records for appropriate action.

If you are dissatisfied with the findings of the Veterans Administration or the amount of this award it is your privilege to enter an appeal therefrom within 1 year from the date of this communication. Such appeal should be submitted to the office having permanent custody of your rec-

ords for certification to the Board of Veterans Appeals, Washington 25, D. C.

If you should change your present address the Veterans Administration must be immediately notified.

All future communications with reference to this case should be addressed to the Veterans Administration, Huntington 1, W. Va., and must bear the file number C-6,871,356, as well as your full name and complete rank and organization.

WKW, Acting Mgr. Area Office No. 8. J. R. Finch, Veterans Administration. Love Field, Dallas 9, Texas.

Attach: Forms 25. 1900.
co: Disabled American Veterans.

gid

[fol. 1691] DEFENDANT'S EXHIBIT No. 17

10-9-59, N.U.H. Rec. 7/21/48.

Rating Sheet

Instructions—If stencil is not used to fill in information in caption, then type only those items which are unshaded.

Name: Still, Carl; C. No. 6 871 356.
Date of Rating: July 20, 1948. 3015/Mw.
Date of Last Examination: 3-29-48.
Type Disch.: Hon. CDD; Active Duty Date: 7-18-45; Date R.A.D.: 1-31-46.
Occupational Determination (if required): Filed 7/26/48 B.E.
Ratings:

Rating Under R & PR 1009-A

It is determined that service connection granted by rating of February 28, 1946, in Area Office No. 8, by way of aggravation for a congenital defect of the spine shown as spondylolisthesis, lumbo-sacral junction, is Clearly and Unmistakably Erroneous as the evidence does not show that there was any superimposed injury on this congenital defect during service; and the instructions now in effect as expressed in R & PR 1063, clearly compel the finding that

in the absence of superimposed injury or active pathology, service connection by way of aggravation may not be granted for such a developmental abnormality.

The veteran has been notified under R & PR 1009 (D).

Complete Rating Follows:

L. Constitutional or developmental abnormality—not a disability under the law. Spondylolisthesis Lumbo-Sacral Joint.

Reviewed under Inst. 1-A, Pub. 458, 79th Congress.

Rated 1945 S, Class 14.

Rating Specialist (Medical): V. S. Hayward, M.D.

Rating Specialist (Legal): C. A. Phillips, Chairman.

Rating Specialist (Occupational): F. W. Turner.

Rating Board No.: 3; Veterans Administration: Huntington 1, W. Va.

[fol. 1692] DEFENDANT'S EXHIBIT No. 18

Abbreviated Clinical Record

10-9-59
N.U.H.

Name: Still, Carl; Grade: Pvt.; Ward: 28.

(This sheet to be used in conjunction with 55A, M.D. in cases where the data hereon will suffice to conform with existing regulations.)

Pertinent history, chief complaint, and condition on admission.

In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees and back. "Heart flutter?" Since this time has had intermittent back pain. Made worse in wet, cold weather. Long periods of standing or walking or carrying wts. will cause pain.

Complete physical examination is negative except for the following:

In 1941, in automobile accident, acquired painful back, laid to sleep in special position on abdomen bar 3 mon. because of pain.

Progress: —.

[fol. 1692a] "RADIOLOGIC RECORD

Name: Still, Carl; Grade: Pvt.; Ward: 28.

Serial No. 35 997 093

* * * * * * *

Hospital: 1/25/46
Date Cp. Beale, Calif.

The 5th lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to ½ of the anterior posterior diameter of the body of the vertebra indicative of spondylolisthesis.

E. W. Kreutzer, Capt, M.C."

HISTORY OF THE PRESENT ILLNESS

Patient states his back first bothered him in the summer of 1942. States he was bed fast for three or four months, his complaint was diagnosed as rheumatism, he contends it was in all of his joints.

Since this time his back has given him trouble. Patient states that long walks or long standing gives him constant and severe pain. His back has always given him severe pain on sentry.

[fol. 1692b] INITIAL SUMMARY, WORKING DIAGNOSIS, CONTEMPLATED LABORATORY TESTS, AND CONSULTATIONS

Name: Still, Carl; Grade: Pvt.; Ward: 28.

Transfer diagnosis: below.

Initial summary: Patient presents a history of severely painful back which dates back to 1941. Nearly all ranges of back motion are limited to corresponding limitation of activity.

Working diagnosis or impression: Spondylolisthesis, second-degree, severe, secondary to congenital defects of lumbar-sacral junction. E.P.T.S.

Contemplated laboratory tests and special examinations: Routine.

[fol. 1692c] PROGRESS NOTES

Name: Still, Carl; Grade: Pvt.; Ward: 28.

(Complications and changes in diagnosis, with date in each case, should be entered on this sheet)

18 Jan.

Patent has a spondylolisthesis which is quite severe. The treatment in this particular case is a spinal fusion. Since E.P.T.S. to bring before board to separated. He is not capable of doing in any status.

E. W. Immermann M.D.

29 Jan 46

Soldier appeared before Special Disposition Board this date and they recommended that he be discharged from military service under the provisions of Section I AR 615-361. M. Can, check.

[fol 1693] DEFENDANT'S EXHIBIT No. 19

10-9-59.
N.U.H.

VETERANS ADMINISTRATION

C-No. 6 871 356

Report of Physical Examination

Date of admission to hospital: —, 19—.
Date of discharge from hospital: —, 19—.
1. Claimant's name: Still, Carl.
Address: 613 Yadkin St., Bluefield, W. Va.
2. Rank and organization: Pvt. SCU Co. D. ASF RRD 1918.
Enlistment: 7-18-45.
Discharge: 1-31-46.
3. Birthplace: Arista, West Virginia.
Age: 21.
Race: Col.
Color of eyes: brown.
Color of hair: black.
4. Height: 68 inches.
Weight: (weigh him): 173.
Highest weight in past year: 185.

5. Examined: VARO Huntington, West Virginia
Ended: March 29, 1948.
6. Permanent marks and scars other than described below:
7. Origin and date of incurrence of disability as alleged by claimant:
Veteran states that he was stationed Cp. Beal, Calif., when hospitalized approx. January, 1946, for his back and right side, remaining until January 31, 1946, did not returned to duty.
8. Brief medical and industrial history:
Medical history:
Veteran states that he has seen Dr. Wright, Bluefield, West Virginia, for his back and rt side.
Industrial history:
Veteran states that he is a student at Mercer Co. Voc School, Blfd. W. Va., entered May, 1947, under Public #16. Before this he was employed by No. #6 Pocahontas Fuel Co. Jenkins Jones, W. Va., employed one month, quitting because of physical disa. First employment since discharge.
[fol. 1693a] 9. Present complaint (subjective symptoms, not diagnosis):
Veteran states that his back gives him trouble, bothered with his rt side. Nervousness.

[fol. 1694] DEFENDANT'S EXHIBIT No. 20

CONSULTATION REPORT

Mar. 29, 1948

History: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a medical discharge in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage.

Examination: The veteran is a very well nourished, muscular, young colored male, with normal station, posture

and gait. There is a definite depression over the lower ribs on the right side of the chest, anteriorly, and patient complains of considerable discomfort on pressure over the area. It is impossible to determine manually any residual pathology because of the apparent pain reaction demonstrated by the patient. The spinal contours are grossly normal except for a slight increase in the normal lumbar curvature. The paravertebral muscles are well developed and not spastic. Percussion anywhere over the lower thoracic and lumbar spine produces very definite reflex, but the patient states that it is not due to pain, but to the fear of pain. When any attempt is made to hyperextend or dorsiflex the spine, the patient makes a very quick, jerky motion and immediately returns to the erect position. He states that this phenomenon is produced by the very marked pain due to the maneuver. In the prone position on the examining table, he is able to come to a sitting position and

——, ——.
(Signature—Title)

Last name: Still. First name: Carl. Middle Initial: ——.

Register No.: 6 871 356.
Ward No.: ——.

[fol. 1694a-1695] flex the spine without any apparent discomfort. There is no limitation of motion in the knee or hip joints, although the patient complains of pain in the lumbosacral joint when the extended leg is internally rotated at the hip. There is no pain when the thigh is acutely flexed or abducted. It is believed that there is a very marked subjective factor present in this case.

X-ray studies requested of lumbosacral spine and of the rib cage.

Diagnosis. Defect congenital lumbosacral spine.

J. S. Klumpp, M.D.

[fol. 1696] DEFENDANT'S EXHIBIT No. 22

CONSULTATION REQUEST AND REPORT

10-9-59.
N.V.H

Name: Still, Carl; Grade: Pvt.; Ward: 28.
To: Medicine. Date: —— ——, 19—.
For consultation of rheumatic history; 1942, heart flutter?
Provisional diagnosis: Clearance for cardiac pathology.
Routine. ✔

E.W. Immerman, M.C.
OK B—OK OV.

24 Jan., 1946.

Opinion of consultant:

I About March 1942, this pt. states he had "rheumatism", while in Gary, West Virginia. This began with a sore throat and was followed 2 or 3 weeks later by migratory polyarthritis involving the knees, wrists, elbows and shoulders, with fever. This illness apparently lasted for a period of several weeks. The pt. states that since that time his "heart flutters" occasionally after or during exercise, and that the "fluttering" disappears if he stops to rest. He also complains of occasional "pulling sensations" in the right lower chest off & on since 1941 when he was in an automobile accident.

• • • • • • •

[fols. 1697-1702] DEFENDANT'S EXHIBIT No. 23

"MEDICAL INFORMATION AND RECOMMENDATIONS FOR VOCATIONAL REHABILITATION

Name: Still, Carl.
C-No.: 6 871 356.

A. Summary of Medical Data Available • • •
Spondylolisthesis, slight limitation of motion lumbar spine.

B. Summary of Significant Social Data and Other Pertinent Information: • • •
Service: 7-18-45/1-31-46.

C. Recommendations of Medical Consultant Pertinent to Choice of Objective:

1. Review of records indicates that full time training may be feasible × Yes.

2. If full time training is considered feasible * * * list types of activities and working conditions to be avoided:

No heavy lifting or excessive bending of back. No excessive standing or walking."

* * * * * * *

[fol. 1703] DEFENDANT'S EXHIBIT No. 29

Work Record of Yard Brakeman Carl Still, July 24, 1951 to January 23, 1958

Month & Year	Number of Days Could Have Worked	Number Days Worked	Reason for Absence
July 1951	0	0	Qualifying for yard.
August 1951	28	28	Off 11th and 12th account death.
September 1951	30	29	Off by permission Sept. 1, 2 and 3. Called 11:00 PM, 8th, did not report for work, held off Sept. 9th. Off sick 23rd, 24th and 30th.
October 1951	31	30	Off sick 1st, 11th, 12th, 13th and 14th. Off by permission 18th, 27th, 28th and 29th.
November 1951	30	12	Marked sick 8th, 9th and 10th. Held out of service 13th to 30th, inclusive and given suspension of 30 days in lieu of dismissal for violation of Rule 426, Book of Rules.
December 1951	31	24	Held out of service 1st to 6th, inclusive, as stated above. Off sick 19, 20, 22, 23, 24 and 25.
January 1952	30	22	Off sick 11th to 20th, inclusive.
February 1952	25	22	Off sick 18th and 19th. Off by permission 25, 26, 27, 28 and 29.
March 1952	25	19	Off by permission 1, 2, 15, 16 and 17th. Could have worked 23rd but marked to foot of extra list.
April 1952	16	9	Off by permission April 4th to 17th, inclusive.
May 1952	18	15	Could have worked 17th and 26th but marked to foot of extra list. Off by permission 30th and 31st.
[fol. 1703a]			
June 1952	19	16	Off by permission 1st, 2nd, 3rd, 18th and 19th. Could have worked June 14th but marked to foot of extra list.

Month & Year	Number of Days Could Have Worked	Number Days Worked	Reason for Absence
July 1952	18	9	Off by permission 9th to 16th, inclusive. Also 24th to 27th, inclusive. Cut off account reduction in force July 29th.
August 1952	19	9	Cut off account reduction in force 1st to 4th, inclusive, recalled August 5th. Off account sickness 7th. Off sick 21, 22, 23 and 24. Off by permission 15th to 19th, inclusive.
September 1952	17	8	Off by permission 2nd and 3rd. Cut off account reduction in force 10th to 16th, inclusive, recalled 17th but did not report until 23rd Worked 3:00 PM, 27th and marked in sick 5:45 PM.
October 1952	13	7	Off by permission 4th to 14th, inclusive. Cut off account reduction in force 23rd to 30th. Recalled 31st but did not mark up.
November 1952	22	6	Recalled October 31st but did not mark up until November 21st.
December 1952	25	22	Off sick 24th to 29th, inclusive.
January 1953	23	17	Off by permission 1, 2, 12, 23, 24, 25, 26 and 27th. Could have worked January 4th but marked to foot of extra list.
February 1953	4	4	Cut off account reduction in force February 4th.

[fol. 1703b]

(Cut off account Reduction in force February 4, 1953 to July 14, 1953)

July 1953	15	9	Recalled July 14th, did not mark up until July 20th. Marked off to attend court July 27th.
August 1953	28	22	Off sick 21st to 24th, inclusive. Off by permission 30th and 31st.
September 1953	22	18	Off by permission 1st and 28th. Marked to foot of extra list to avoid working 5th and 13th.
October 1953	22	18	Off by permission 10th, 29th and 30th. Marked to foot of extra list to avoid working 24th and 25th.
November 1953	5	5	Cut off account reduction in force November 10, 1953.
December 1953	12	3	Cut off account reduction in force 1st to 14th. Recalled 14th but did not mark up until December 28th.
January 1954	20	16	Off by permission 12th and 18th. Called to report 3:00 PM 13th but did not show up for work. Held out of service on 14th.

Month & Year	Number of Days Could Have Worked	Number Days Worked	Reason for Absence
February 1954	2	2	Cut off account reduction in force February 4th.
(Cut off account reduction in force February 4, 1954 to November 22, 1954)			
November 1954	7	7	
December 1954	27	19	Marked off 8:00 AM 24th account death. Off 24th to 31st inclusive.
January 1955	25	16	Off account death January 1st to 9th, inclusive.
[fol. 1703c]			
February 1955	22	11	Off sick 5th and 6th. Off by permission 12th to 23rd, inclusive.
March 1955	22	18	Off by permission 4th, 5th, 26th, 27th, 28th and 29th.
April 1955	12	7	Cut off account reduction in force April 11th and recalled on 22nd but did not report until April 24th. Off by permission 6th to 10th, inclusive.
May 1955	24	19	Off by permission May 1, 22, 29, 30 and 31st.
June 1955	24	18	Off by permission 4th, 5th, 6th and 30th. Off sick 17th to 20th, inclusive.
July 1955	29	21	Off by permission July 1st to 5th. Off sick 17, 18, 26 and 27th.
August 1955	28	16	Marked off 8th for funeral. Off sick 13, 14, 15, 16, 17, 18, 19, 20, 21, 28, 29 and 30th.
September 1955	26	22	Off sick 4, 17, 18 and 30th.
October 1955	30	22	Marked sick 1, 2, 3, 29 and 30th. Marked off 10th and back up same date to keep from working. Marked off for funeral 23rd, 24th.
November 1955	25	18	Marked sick 1st and 2nd. Marked off for funeral 17, 18, 19 and 20th. Marked off 22nd account sickness, could have worked, marked up same date.
December 1955	28	26	Marked off account death 18th and 19th.
[fol. 1703d]			
January 1956 (1st to 23rd, inclusive)	17	23	Marked off January 23rd, car wreck.
[fol. 1703e]			
January 1956	23	26	Marked off 23rd account car wreck. Marked sick 26th.
February 1956	26	18	Marked sick 5, 24, 25, 26 and 27th. Displaced by senior employee 8th and 9th, but could have worked had he exercised his seniority. Marked off 17th and 18th to attend court.

Month & Year	Number of Days Could Have Worked	Number Days Worked	Reason for Absence
March 1956	18	15	Marked sick March 1st. Displaced by senior employee 6th and 7th but could have worked had he exercised his seniority.
April 1956	22	17	Off by permission 2nd. Marked sick 17th. Displaced by senior employee 15th and 16th but could have worked had he exercised his seniority.
May 1956	22	19	Worked 8th and marked in sick 1:05 PM. Off sick 9, 12 and 22nd.
June 1956	18	16	Off sick 17th and 18th.
July 1956	24	17	Off sick 1, 2, 3 and 15th. Displaced by senior employee 4th, could have worked 4th, 5th and 6th but did not exercise his displacement until July 7th.
August 1956	24	24	Off sick 13th and 14th, and 27th. Off by permission 20th and 21st.
September 1956	20	17	Off sick 2nd, 3rd and 27th.
October 1956	17	12	Off sick 7, 8 and 16. Off account death 20 and 21. Worked 24th and relieved 3:50 AM, 25th, account deserting his crew. Held out of service 25th to 31st, inclusive.

[fol. 1703f-1705]

November 1956	(Dismissed November 13, 1956. Reinstated November 18, 1957 with seniority rights unimpaired and the dismissal changed to 30 days in lieu of dismissal.)		
November 1957	9	8	Reinstated on 18th and marked up 19th.
December 1957	21	20	Off sick 11th.
January 1958	21	19	Marked sick 8th with sore throat. Off by permission 12th.
February 1958	(Marked off injured February 2nd, 1958 and has not worked since that date.)		

[fols. 1706-1727] DEFENDANT'S EXHIBIT No. 32

NORFOLK AND WESTERN RAILWAY CO.

RELIEF AND PENSION DEPARTMENT

Bluefield, W. Va., 11/18/1957

To: P. C. Wingo, superintendent. Poca. Division.
Record of: Still, Carl, "NM".
Employed as: Yard Brakeman.
Date of Birth: 3/17/26.
Applicant for: Biennial.
Has been examined for sight, color sense, and hearing, and Approved: ——.
Without Glasses: R. 1/14—20/30. L. 1/14—20/20.
With Glasses: R. ——. L. ——.
Glasses—None . . 1 pair reading 2 pairs distance
2 pairs bifocals . . .
(Check in blank space style glasses used)

H. E. Troup, Medical Examiner District No. 4.

[fol. 1727] IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA, CHARLESTON, KANAWHA COUNTY

Case No. 5734

CARL STILL,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation

TRESPASS-ON-THE CASE

ORDER DENYING PETITION FOR A WRIT OF ERROR AND SUPERSEDEAS—September 12, 1960

On a former day, to-wit, June 7, 1960, came the petitioner, Carl Still, by Burton, Griffith, Burton and Burkett, and Walter G. Burton, his attorneys, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Cicuit Court of Mercer County rendered in this case on the 16th day of October, 1959, with the record therein accompanying the petition, and note of argument in

support thereof, and note of argument by Sanders & Sanders, counsel for the defendant, in opposition to granting the writ of error, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused.

A true copy.

Attest: Kenneth E. Hines, Clerk, Supreme Court of Appeals.

Entered on minute book No. 35, page 560 v. 2, September 15, 1960. L. T. Reynolds, Clerk, Circuit Court, Mercer County.

[fol. 1728] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. —

CARL STILL, Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 1, 1960

Upon Consideration of the Application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 10th, 1961.

Earl Warren, Chief Justice of the United States.

Dated this 1st day of December, 1960.

[fol. 1729] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 713

CARL STILL, Petitioner,

vs.

NORFOLK & WESTERN RAILWAY COMPANY

ORDER ALLOWING CERTIORARI—April 17, 1961.

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1730] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 713

CARL STILL, Petitioner,

vs.

NORFOLK & WESTERN RAILWAY COMPANY

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 19, 1961

On Consideration of the motion of the petitioner for leave to proceed further herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 602323 78

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA AND OR TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

CARL STILL, *Petitioner*

v.

NORFOLK & WESTERN RAILWAY COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA AND OR TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Mercer County, West Virginia, entered in the above-entitled case on October 16, 1959, and the judgment of the Supreme Court of Appeals of West Virginia, entered in the above-entitled case on September 12, 1960.

OPINIONS BELOW

The judgment of the Circuit Court of Mercer County, West Virginia, is unreported; it is printed in Ap-

pendix A hereto, *infra*, p. 1a. A Petition for Writ of Error and Supersedeas was filed in the Supreme Court of Appeals of West Virginia but denied by that court without opinion. The judgment of the Supreme Court of Appeals of West Virginia is also unreported; a copy of the clerk's memorandum of the court's judgment is printed in Appendix A hereto, *infra*, p. 4a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered September 12, 1960. By order dated December 1, 1960, the time to file Petition for Writ of Certiorari was extended by the Chief Justice to and including February 10, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1959).

QUESTION PRESENTED

In a Federal Employers' Liability Act case, did the trial court err in directing a verdict for the respondent railroad on the ground that the petitioner employee, because of alleged misrepresentations relating to his health and physical condition made when he applied for employment, failed to achieve the status of an employee entitled to the benefits of the Act where (a) petitioner worked satisfactorily for respondent for more than 5 years prior to the accident, (b) the alleged misrepresentations were made more than six years prior to the accident during which period respondent had fired and rehired petitioner after more than a year's absence without application or examination, (c) the principal alleged misrepresentation was a pre-existing congenital physical condition which was plainly visible to respondent's examining physician at the time he ap-

proved petitioner for employment, (d) none of the alleged misrepresentations had any causal relationship with the happening of the accident, and (e) there was highly persuasive evidence that there had been no misrepresentation?

STATUTE INVOLVED

45 U.S.C. § 51 (1959) (Federal Employers' Liability Act):

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT

Petitioner, a yard brakeman employed for more than five years by respondent, Norfolk & Western Railway Company, was severely injured during the course of a switching operation in respondent's railroad yards in Bluefield, West Virginia on January 23, 1958 (Tr. 476, 497, 1006, 1190). His injury, which permanently disabled him, occurred when a string of railroad cars overtook and violently recoupled with a railroad car on which he was riding pursuant to instructions of his superior (Tr. 68, 71, 146-147, 375, 520, 1007, 1023, 1437).

The evidence was clear that the accident resulted from the negligence of respondent's employees and that petitioner was an innocent victim thereof (Tr. 207, 340, 513, 1022-1025, 1032-1035, 1052). The impact, a hard one, caused petitioner to be thrown forward (Tr. 207, 208, 210, 338, 1044), and his left side, from about his waist to just above his knee, was hurled against the car on which he was riding (Tr. 210, 525).

The effect of the accident was to separate and dislocate petitioner's spinal column, which thus disabled him from engaging in manual labor, the only kind of work he knew (Tr. 68-71, 146-147). Thirty-one years old at the time of his injury, petitioner, a Negro, has never worked in any capacity other than that of a laborer (Tr. 487).

The condition which petitioner was alleged to have concealed is known medically as spondylolisthesis (Tr. 53, 81). This condition involves any amount of slipping forward of one vertebra on another (Tr. 52-53, 121). In its ordinary and non-aggravated form it frequently passes unnoticed by the victim and no symptoms are associated with it (Tr. 54, 148, 664, 669, 683, 688, 853). Indeed, many persons go through life without knowing they have such a condition (Tr. 682, 684, 860). They are able to perform the most strenuous kind of physical labor (Tr. 54, 683, 855). Petitioner seems to have had the condition in this form since his birth (Tr. 53, 82, 120, 664, 852, 853).

The evidence at the trial was that the impact which petitioner sustained was so severe that his vertebrae were separated and dislocated (Tr. 152-153), resulting in permanent disability (Tr. 68-71, 146-147); that this disability came about from the trauma suffered by petitioner in the accident (Tr. 54, 152-153).

Suit was filed May 14, 1959; the case was pre-tried August 10, 1959; on September 10, 1959, counsel for respondent stipulated that petitioner was an employee within the meaning of the Federal Employers' Liability Act (R. 93-94). Nevertheless, on the first day of trial, October 5, 1959, the trial judge permitted respondent, over petitioner's objection, to enter a special plea alleging that information given by petitioner when he sought employment in 1951 was wilfully false, that there was a causal connection between the alleged false information and the injuries sustained in the accident, and that petitioner therefore was not an employee within the meaning of the Federal Employers' Liability Act (R. 119). Petitioner's demurrer to the special plea was overruled by the trial judge (Tr. 14, 39; R. 126).

At the conclusion of all the evidence, the trial judge, over petitioner's objection, permitted respondent to amend its special plea, overruled petitioner's demurrer to the same, and ruled as a matter of law that petitioner had fraudulently obtained his employment by wilfully and falsely concealing material information, and that there was a causal connection between the concealed facts and the injuries; that petitioner therefore was not an employee within the meaning of the FELA and not entitled to the benefits thereof (Tr. 1400-1423; R. 129, 138; Appendix A, *infra*, p. 1a). The trial court therefore granted respondent's motion for a directed verdict and directed the jury so to find (Tr. 1423).

Petitioner attempted to appeal to the Supreme Court of Appeals of West Virginia; however, as stated, his Petition for Writ of Error and Supersedeas was denied by that court (R. 1727; Appendix A, *infra*, p. 4a).

During the trial, respondent contended that petitioner had obtained his employment by various misrepresentations relating principally to his health and prior employment. It contended that petitioner had falsely answered certain questions on his 1951 employment application and had also given false answers to certain questions asked by respondent's examining physician during his pre-employment physical examination, which information, according to the physician, was recorded by him (R. 119, 121, 1678-1679).

Petitioner denied that respondent's physician asked him the questions and that he gave the answers recorded by the physician (Tr. 704-708, 784). Petitioner also denied that the physician spoke to him individually (Tr. 639). He stated that the physician examined and spoke to five or six other men at the same time and

then gave him a bunch of papers to sign (Tr. 637, 639, 705, 708).

In contrast, respondent's physician had no personal recollection of examining and approving petitioner in 1951 but relied solely on his records (Tr. 1222, 1227). His testimony that he thought he had asked petitioner every question on the medical application in the order listed and then recorded the answers in his own handwriting was based "on his usual custom", not any recollection of this case (Tr. 1223, 1227, 1229).

Respondent's physician testified that the men were given different physical examinations depending upon the position applied for and that physical requirements for brakemen were the highest the railroad had (Tr. 1216-1217). He also characterized his 1951 pre-employment physical examination of petitioner as thorough and rigid (Tr. 1245-1247). Since petitioner's spondylolisthesis was readily discoverable on medical examination,[1] respondent's physician either failed to see what was readily apparent or chose to ignore it (Tr. 1246).

The impropriety in such circumstances of respondent's claim that information was concealed from it is further pointed up by the fact that respondent dismissed petitioner from its employment in October, 1956 (Tr. 781, 1281-1282; R. 1672); and subsequently, in November, 1957, reinstated him (Tr. 781; R. 1671). When he was reinstated, petitioner was required to sign

---

[1] Petitioner's service records, as far back as 1947, noted that he had a "prominent sacrum with a hollow back . . . ." (Tr. 842). It was also discovered, of course, by Dr. Crutchfield, who examined petitioner for respondent for the purpose of being able to testify at trial and testified that he knew petitioner had a spondylolisthesis because he was able to feel a depression in his back (Tr. 662).

a waiver of all claims for loss of time and earnings for the interim period and to waive vacation rights until properly qualifying for them after reinstatement (R. 1673). From these circumstances it is clear that petitioner was hired again in 1957; nevertheless, he was not required to fill out a new application for employment, no medical information was requested by respondent and none given by petitioner, and respondent chose to give no physical examination except a routine eye examination (Tr. 1287). Moreover no such information or examination was requested or given at any time between petitioner's reinstatement and subsequent injury.

Respondent's principal contention in connection with its claim that petitioner obtained his employment by misrepresentation was directed to the existence of spondylolisthesis. It pointed, however, to other claimed falsities to which we make brief reference.[2] Peti-

---

[2] Respondent claims petitioner received a medical discharge from the service and that his answer that he received an honorable discharge was false (R. 129, 131). Since petitioner's honorable discharge was introduced into evidence this claim seems without merit (R. 1677).

Respondent claims petitioner failed to list all prior employments (R. 129). Petitioner listed as previous employment a job he had held from November, 1948, to July, 1951, which job he left to obtain employment with respondent. He did not list other prior employments. Petitioner explained that he misinterpreted this question and that he thought he had answered it properly (Tr. 643, 644). This information seems wholly immaterial and irrelevant in this case.

Respondent claims petitioner failed to disclose that he had been previously employed by respondent (R. 131). Petitioner's recollection was vague as to whether he had been so previously employed, but he testified that he had not previously worked for respondent (Tr. 719, 732). In any event respondent's records showed that petitioner had been given credit for a few hours on

tioner categorically denied that he knowingly gave any false information (Tr. 1389).

No question was specifically directed to whether petitioner had spondylolisthesis. Assuming petitioner knew of this condition, three of the questions, considered carefully, might have called for him to furnish this information. The first of these, and his handwritten answer, appeared in petitioner's employment application as follows (R. 1678):

> "17. What is the general condition of your health at present?
>
> *Good* "

---

the job, entitling him to $8.80 in 1943 and less than $3.00 in 1948 (Tr. 1002, 1003).

Respondent claims petitioner failed to disclose that he had had rheumatism (R. 131). As to this, petitioner explained that although he had been under a doctor's care for rheumatic fever sometime prior to his going into the Army and had had some trouble with his joints and back, he was also told by the doctor that he would outgrow it and that he would be all right (Tr. 723). In any event this too seems immaterial and irrelevant in this case.

Respondent claims petitioner failed to disclose prior injuries (R. 130). As to this, petitioner explained that he had been involved in a childhood automobile accident, that he understood that he hurt his side and that he believed he broke his ribs (Tr. 488, 614, 645). He had no personal recollection about this accident and explained that his mother had told him about it (Tr. 645)

Respondent claims petitioner failed to disclose that he had been previously examined for employment (R. 131). This question, however, indicated that it was only seeking information about prior examinations which had resulted in rejections and the reasons for the same (R. 1679). The evidence was that petitioner had passed several pre-employment examinations and had never been rejected for any reason (Tr. 601-602, 631). It appears therefore that he answered this question properly and that any information he might have volunteered would have been immaterial and irrelevant.

This question called for an opinion. In any event, the evidence was that, so far as petitioner knew, he enjoyed good health at the time of the application as in fact he did during the succeeding years while he worked for respondent.

A second possibility was a question, allegedly asked by respondent's examining physician (R. 1679). The question, with the physician's handwritten answer, appeared as follows:

> "Have you ever had a long or serious illness?
>
> *No* "

In this connection, there was evidence that while in the military service in the middle 1940's, petitioner had been hospitalized for 21 days on account of trouble with his side and that he had also told the Army doctors that at times he had had some trouble with his back (Tr. 612). But even assuming this was an illness, fair minded people might feel that this was neither "long" nor "serious".

The third possibility was also a question allegedly asked by the physician, the answer appearing in his handwriting (R. 1679):

> "Have you ever had Tumor, Ulcer, Physical Defect or been operated upon?
>
> *No* "

Petitioner denied that he was asked this question, but even if he was, there was no evidence to establish that he knew he had a physical defect (Tr. 622).

Petitioner's past employment record supports the view that he was in good health and knew of no physical

defect. His first job, before he was 19 years old was in the West Virginia Coal Mines (Tr. 601). To get this job, he took and passed a pre-employment physical examination (Tr. 602). His next job was making bomb shells (Tr. 601). Just after he turned 19 years of age, he was drafted and he entered the Army on July 18, 1945 (Tr. 600). He did not have any trouble passing the Army induction physical examination and he did not experience any difficulty performing his duties as a soldier during basic training (Tr. 604, 608). After he got out of the Army he went to a vocational school for about twenty months to learn to be an automobile mechanic and during this period, he also worked as a janitor (Tr. 625). He then returned to working in the mines, dusting the cut, loading coal, laying track and handling timbers weighing 40 to 50 pounds (Tr. 489, 490, 492). He also took and passed several pre-employment physical examinations in order to obtain these various jobs and he never experienced any trouble doing the necessary heavy physical labor which these jobs required (Tr. 492, 601-602, 630-632).

During the years he worked for respondent, petitioner was reputed to be and was one of the railroad's strongest brakemen (Tr. 315-316, 576-577). He always performed his duties in a satisfactory manner and was always considered a good and competent brakeman (Tr. 222, 276, 315-316, 346, 481, 529, 576-577, 1165, 1190). There had never been any complaints about the way in which he discharged his duties to or by any officials of the railroad (Tr. 596, 1190). His physical condition during this period was considered good by his fellow employees and also by his superiors (Tr. 315, 1165, 1190).

Respondent sought to establish, through petitioner's military service records, that petitioner had knowledge of his pre-existing spondylolisthesis and that he wilfully misrepresented this condition on his employment application. These records, however, when considered together, corroborate petitioner's belief that he was in good health and also that he had no knowledge of having spondylolisthesis at the time he applied for employment in 1951.[3]

Notwithstanding the judgment of the trial court, which deprived petitioner of his status of an employee entitled to the benefits of the FELA, respondent, both before and after the ruling, accorded petitioner the status of an employee. For example, petitioner's 1951 employment application, prepared of course by respondent, did not provide that misrepresentation would void his status as an employee but rather stated that a false statement or misrepresentation would justify dismissal[4] (R. 1678). Following the trial court's ruling, respondent continued to treat petitioner as an employee

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[3] While the records, as noted, indicate that petitioner was hospitalized for his side and back and that he also suffered congenitally from spondylolisthesis for aggravation of which, following his discharge, he was awarded a monthly pension of $11.50 (R. 1690), the records also established that this pension was revoked in July, 1948, and petitioner was notified that his condition was "not a disability under the law" (R. 1691). Respondent also relies on the fact that in December, 1950, petitioner, complaining of back trouble, executed an application for admission to a Veterans Administration Hospital (R. 1688); however, his application was denied and he was advised that medical findings failed to disclose a need for hospital treatment or domiciliary care (R. 1689).

[4] The exact language in the application was: "I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company."

and, on November 24 ,1959, conducted a hearing to investigate if in fact there had been any misrepresentations by petitioner at the time he sought employment. Subsequently, by letter dated December 7, 1959, respondent advised him "You have been dismissed from the service for falsifying application for employment as Yard Brakeman and false statements made in connection with physical examination for employment, July 23, 1951" (R. 144F-H).

REASONS FOR GRANTING THE WRIT

The decisions below encroach upon the rights of employees under the Federal Employers Liability Act. They are in conflict with applicable decisions of this Court construing that statute.

1. The trial court concluded that a railroad defendant in an FELA case, which had enjoyed the benefits of an employee's services for more than five years without questioning his status—indeed had confirmed it on one occasion—could defeat his just claim for recompense for injuries suffered as a result of the railroad's negligence by showing that he had made misrepresentations when he applied for employment and that therefore he was not an employee within the meaning of the Act.

It purported to find support for this extraordinary result in this Court's decisions in *Minneapolis, St. P. & S. S. M. R. Co.* v. *Rock*, 279 U.S. 410, and *Minneapolis, St. P. & S. S. M. R. Co* v. *Borum*, 286 U.S. 447. Those cases, of course, do not stand for any such proposition.

In *Rock*, the putative employee who brought an action under the FELA was an impostor and was prop-

erly held to be no employee at all. In his own name and person he had been denied employment because of what an examination revealed as to his physical condition. Thereafter he applied under another name, representing that h had not theretofore applied for work, and had another person stand in for him at the required physical examination. In effect, therefore, the railroad hired a different man from the man it thought it was hiring, and the plaintiff could not fairly be considered an employee.

In *Borum*, the same railroad attempted to extend the principle of the *Rock* case to a very different fact situation—one strikingly similar to that involved here. This Court squarely rejected the attempt and made clear how limited is any rule to be derived from the *Rock* case.

In *Borum*, the undisputed fact was that the plaintiff employee, who, like petitioner, had served his railroad employer for many years, had falsified his age when he applied for employment. The railroad had a rule against employing anyone over the age of 45. The plaintiff was 49 but stated in his application and again to an examining physician that he was 38. These facts were held by the Court not to bring the case within the rule laid down in *Rock*.

In the course of its opinion in the *Borum* case, the Court remarked that "neither his age nor his physical condition contributed to cause [the plaintiff's] injury." The trial court may have misconstrued this language, which referred to the happening of the accident, not its effects. The trial court may have treated it as giving rise to a negative implication justifying it in denying employee status to petitioner because the effect of the accident caused by respondent's negli-

gence—to the happening of which accident the physical condition of petitioner, one of respondent's strongest brakemen, did not contribute in the slightest—was to aggravate a pre-existing condition that petitioner allegedly failed to disclose. Clearly, if any inference at all is to be drawn from the quoted statement, it is no more than that an employee who conceals myopia, for example, may not be heard to complain if he is injured in an accident which occurs as a result of his failing to see a railroad car. It does not mean that more than five years of faithful service will go for naught merely because employer negligence results in injury to a part of the body whose quite common, non-symptomatic and non-disabling condition an employee may not have disclosed. The decisions of federal and state courts are in accord with this view. *Payne* v. *Dougherty*, 283 Fed. 353 (8th Cir. 1922); *Matthews* v. *Atchinson, T. & S. F. Ry. Co.*, 54 Cal. App. 2d 549, 129 P. 2d 435 at 441 (1942); *White* v. *Thompson*, 181 Kan. 485, 312 P. 2d 612 at 613 & 620 (1957); and *Blanton* v. *Northern Pac. Ry. Co.*, 215 Minn. 442, 10 N.W. 2d 382 at 385 (1943); *Laughter* v. *Powell*, 219 N.C. 689, 14 S.E. 2d 826, 136 A.L.R. 1116 (1941) cert. den. 314 U.S. 666; See *Eresafe* v. *New York, New Haven & Hartford R. Co.*, 250 F. 2d 619 (2nd Cir. 1957); and *Casso* v. *Pennsylvania Railway Company*, 219 F. 2d 303 (3rd Cir. 1955); See generally Merrill, *Misrepresentations to Secure Employment*, 14 Minn. L. Rev. 646 (1930) and *Annot.*, 136 A.L.R. 1124 (1942).

2. We have assumed in the foregoing discussion that (as in *Rock* and *Borum*) there was unquestioned factual basis on which the trial court might act to sustain respondent's special plea. There was no such basis. As our statement of the case makes clear, the evidence was in sharp conflict as to (1) whether petitioner made

any misrepresentations, (2) whether any such misrepresentation was fraudulent or even knowing, (3) whether respondent, which made a careful examination of petitioner's physical condition, relied on any such misrepresentation in deciding to hire him and (4) whether respondent waived its right to rely on any such misrepresentation by subsequently rehiring petitioner without re-examining him.

In directing a verdict for respondent, the trial court resolved these factual issues in favor of respondent and adversely to petitioner. It hereby deprived petitioner of his right to trial by jury, which is "a basic and fundamental feature of our system of federal jurisprudence" and "is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Bailey* v. *Central Vt. R. Co.*, 319 U.S. 350, 354.

The rule that, under the FELA, factual issues are for juries and not for judges, repeatedly emphasized by this Court in recent terms,[5] is, of course, not limited to issues involving negligence or causation. This was made clear in *Baker* v. *Texas and Pacific Railway Co.*, 359 U.S. 227, holding that whether or not an employee of an independent contractor of a railroad was also an employee of the railroad entitled to the benefits of the FELA was a question for the jury. See *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, which held that issues relating to alleged fraud in procuring a release were also for the jury and its verdict on such issues allowed to stand.

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[5] e.g. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500; see generally DePareq, *A Decade Of Progress Under The Federal Employers' Liability Act*, 18 Law and Contemporary Problems, 257 at 260 (1953); and note, 69 Harv. L. Rev. 1441 at 1447 (1956).

CONCLUSION

For these reasons, it is submitted that petitioner was an employee within the meaning of and entitled to the benefits of the FELA and in any event that the issues were for the jury. It follows therefore that the trial court erred in directing a verdict for respondent.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February, 1961

APPENDIX A

Judgment of the Circuit Court of Mercer County, West Virginia and Notice from the Clerk of the Supreme Court of Appeals of West Virginia

IN THE CIRCUIT COURT OF MERCER COUNTY
WEST VIRGINIA

CARL STILL, *Plaintiff* — TRESPASS ON THE CASE

v. — Case No.5734

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation, *Defendant*

Order

This the 5th day of October, 1959, came the parties by their attorneys , and both sides announced ready for trial.

Thereupon, the defendant for plea in its behalf says that it is not guilty in manner and form as alleged in the plaintiff's Amended Declaration filed herein, and of this it puts itself upon the country, and the plaintiff doth the like, and issue is thereon joined.

Thereupon, the defendant tendered and asked leave to file its special plea in writing, entitled Defendant's Special Plea No. 1, to the filing of which Plea the plaintiff objected and assigned his reasons for his objections to the filing of said Plea in the record, but the Court overruled said objections of the plaintiff and ordered the said Plea to be filed, to which action and ruling of the Court in permitting and allowing the defendant to file Defendant's Special Plea No. 1, the plaintiff at the time objected and excepted.

Thereupon, the plaintiff, Carl Still, tendered to the Court and asked leave to file his written Demurrer to said Defendant's Special Plea No. 1, in which Demurrer the defendant joined, and the Court, after hearing argument upon said

Demurrer, is of opinion to and doth overrule plaintiff's Demurrer to Defendant's Special Plea No. 1, to which action and ruling of the Court in overruling plaintiff's Demurrer to Defendant's Special Plea No. 1, plaintiff at the time objected and excepted.

Thereupon came a jury, to-wit, James E. Thomas and eleven other good and lawful men and women, who were duly selected, impaneled and sworn to well and truly try the matter in issue between the plaintiff and the defendant, and a true verdict render according to the evidence.

Thereupon, the plaintiff and the defendant introduced their evidence before the jury and rested their respective cases, and upon the conclusion of said evidence defendant asked leave of the Court to amend its Special Plea No. 1, and tendered and asked leave to file Defendant's Amended Special Plea No. 1, to the filing of which Amended Special Plea No. 1, the plaintiff at the time objected, and assigned his reasons for his objections to the filing of said Amended Special Plea No. 1 in the record, but the Court overruled plaintiff's said objections and ordered said Defendant's Amended Special Plea No. 1 to be filed, to which action and ruling of the Court in permitting and allowing defendant to file its Amended Special Plea No. 1, the plaintiff objected and excepted.

Thereupon, the plaintiff tendered to the Court and asked leave to file his written Demurrer to Defendant's Amended Special Plea No. 1, in which Demurrer the defendant joined, and the Court, after hearing argument upon said Demurrer, is of opinion to and doth overrule said Demurrer to Defendant's Amended Special Plea No. 1, to which action and ruling of the Court in overruling said Demurrer, the plaintiff at the time objected and excepted.

Thereupon, both plaintiff and defendant having introduced their evidence and rested their respective cases, the defendant moved the Court to direct the jury to find a

verdict in favor of the defendant, on the ground and for the reason that plaintiff, Carl Still, in his written application to defendant for employment in July 1951, and in his answers to certain questions propounded to him by Dr. Harold E. Troup, defendant's medical examiner, at the time of plaintiff's examination, had made false and fraudulent answers with respect to his Army service, his medical discharge from the Army, his previous employment, his previous accidents, his physical condition, his past illnesses, and other important and material matters which should have been disclosed to defendant at the time of plaintiff's employment, and that by reason of said false and fraudulent answers to said questions appearing in said application for employment, and said questions propounded to plaintiff by defendant's medical examiner, that plaintiff had fraudulently procured employment as a yard brakeman with defendant, which motion was resisted by plaintiff.

Thereupon said motion, being argued by counsel and considered by the Court, was sustained, and the Court, for reasons set forth in its opinion dictated to the court reporter at the time of passing on said motion, directed the jury to find a verdict in favor of the defendant.

Thereupon, pursuant to the Court's direction, the jury returned the following verdict:

> "We the jury at the direction of the Court, agree and find for the defendant.
>
> James E. Thomas
> Foreman"

whereupon the jury was discharged.

Thereupon, the plaintiff moved the Court to set aside the jury's verdict and award to the plaintiff a new trial, on the ground and for the reason that the evidence introduced on behalf of the plaintiff was sufficient to justify the jury in finding a verdict in favor of the plaintiff, which motion was resisted by the defendant and was overruled by the

Court, to which action and ruling of the Court the plaintiff at the time objected and excepted.

And now proceeding to render judgment on said jury's verdict, it is considered by the Court that the plaintiff take nothing by his action against the defendant herein, and that judgment be and the same is hereby rendered against the plaintiff, and in favor of the defendant, and it is further considered that the defendant shall have and recover of and from the plaintiff its costs incurred in and about the defense of this action, including a statutory attorney's fee of $10.00.

On motion of plaintiff, execution on the foregoing judgment is suspended for a period of sixty days in order to give the plaintiff an opportunity to apply to the Supreme Court of Appeals of West Virginia for a writ of error and supersedeas to the judgment hereby rendered.

Enter:

F. Warton Wagner
Judge

State of West Virginia

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 12th day of September, 1960, the following order was made and entered, to-wit:

Carl Still — Trespass on the Case

v. — Case No. 5734

Norfolk and Western Railway Company, a Corporation

On a former day, to-wit, June 7, 1960, came the petitioner, Carl Still, by Burton, Griffith, Burton and Burkett, and Walter G. Burton, his attorneys, and presented to the Court his petition praying for a writ of error and super-

sedeas to a judgment of the Circuit Court of Mercer County rendered in this case on the 16th day of October, 1959, with the record therein accompanying the petition, and note of argument in support thereof, and note of argument by Sanders & Sanders, counsel for the defendant, in opposition to granting the writ of error, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused.

A true copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

OFFICE OF THE CLERK
SUPREME COURT, U.S.
JAMES R. BROWNING

No. [redacted] 115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

[redacted]

v.

[redacted]

Petition for a Writ of Certiorari to the Circuit Court of Mercer County, West Virginia and/or to the Supreme Court of Appeals of West Virginia

BRIEF FOR THE RESPONDENT IN OPPOSITION

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 713

CARL STILL, *Petitioner*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Respondent*

Petition for a Writ of Certiorari to the Circuit Court of Mercer County, West Virginia and/or to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the Circuit Court of Mercer County, West Virginia, is unreported; it is printed in the Appendix to the petition for Certiorari. However, the opinion of the Circuit Court appears on pages 1409-1422 of the transcript of the proceedings in the Circuit Court.

The judgment of the Supreme Court of Appeals of West Virginia is also unreported. A copy of the order refusing to grant petitioner a writ of error and supersedeas to the judgment of the Circuit Court of Mercer County, West Virginia, appears in the Appendix to the petition for Certiorari. The refusal to grant the writ of error and supersedeas was unanimous. Under the rules of the Supreme Court of Appeals of West Virginia, had any judge voted in favor of granting the writ of error and supersedeas, this would have appeared in the order of refusal.

QUESTIONS PRESENTED

1. Was the evidence sufficient to justify the jury in finding that respondent was negligent.

2. Did the trial court err in directing a verdict in favor of respondent where the evidence showed without substantial conflict (a) that petitioner, prior to his employment by respondent, had received a medical discharge from the United States Army, and a pension, for second-degree, severe spondylolisthesis, which disabled petitioner from performing effective military service; that petitioner had been seriously disabled by rheumatism, which confined him to bed for several months, affecting his back, and other parts of his body; that petitioner had sustained a personal injury in an automobile accident which substantially aggravated his low back condition; and that seven months prior to his employment by respondent, petitioner had applied to the Veterans Administration for hospitalization for such low back disability, (b) petitioner, by means of false answers in his written application for employment, and to respondent's medical examiner,

fraudulently concealed his prior military service and medical discharge; his application for hospitalization for his low back condition; the fact that he had a severe spondylolisthesis; and had been seriously disabled with rheumatism, and by injuries sustained in an automobile accident, (c) respondent's medical examiner, in reliance upon the answers given by petitioner in said Application for Employment, and to said medical examiner, approved petitioner for employment by respondent, (d) had petitioner given truthful answers to the questions contained in said application for employment, and to said medical examiner, his application for employment would have been rejected, (e) petitioner, due to his physical condition, was not employable, as a railroad brakeman, and no medical examiner would have been justified in approving petitioner for such employment, (f) respondent did not discover that petitioner had a spondylolisthesis, or any other disability, until subsequent to petitioner's alleged injury January 23, 1958, (g) the condition which petitioner had while in the Army, and for which he was given a medical discharge, was precisely the same condition he had at the time of the trial, (h) there was a direct causal connection between petitioner's false and fraudulent representations to respondent, and the injuries alleged to have been sustained by petitioner on January 23, 1958.

INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT

The petitioner's Statement contains many inaccuracies, and omits much that is necessary for a proper understanding of the case. We will, in our Statement of Facts, correct these inaccuracies and supply the omissions.

KIND OF ACTION AND PROCEEDINGS IN TRIAL COURT

This is an action instituted by petitioner against respondent under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51-8, to recover for personal injuries alleged to have been sustained by petitioner in respondent's west railroad yard at Bluefield, West Virginia, on January 23, 1958, when an empty coal car on which plaintiff was riding, while engaged in a switching operation, was coupled to by a following train of sixty-nine empty coal cars. Petitioner claimed that the above mentioned coupling resulted in a severe spondylolisthesis which totally and permanently disabled him from performing his duties as a yard brakeman.

Petitioner's contention with reference to his alleged injury is summed up in the following statement made by his attorney at a pre-trial conference held in this action on August 10, 1959:

> "Now, we claim that in that accident he (petitioner) sustained a very serious and permanent injury. We claim that he had the fifth, or last, vertebra in his backbone, which attached onto the sacrum, *knocked forward and about half displaced*, or better, on the sacrum, thereby affecting the nerves in his spinal cord and his backbone." Tr. 1434.

At the same pre-trial conference petitioner's attorney stated that prior to January 23, 1958, petitioner had had no back injuries or back disabilities, and "had never been to a doctor". Tr. 1439-1440.

At the trial respondent pleaded the general issue and filed its Special Plea No. 1, and its Amended Special Plea No. 1, which Pleas alleged in substance that in

petitioner's written application for employment with respondent dated July 24, 1951, and in response to questions propounded to petitioner by respondent's medical examiner at that time, petitioner had made certain false and fraudulent answers with respect to his health and physical condition, his previous accidents, injuries and illnesses, and his past military service, and medical discharge therefrom.

The said Special Pleas filed by respondent further alleged that for many years prior to his employment by respondent in July, 1951, petitioner had suffered with a severe spondylolisthesis; that petitioner had been discharged from the United States Army on January 31, 1946, by reason of said spondylolisthesis—a medical discharge—and had received a pension for such disability from the United States Government for a period of approximately three years; that petitioner had suffered from a severe attack of rheumatism which caused disability of his back, and had been involved in an automobile accident in which he had injured his back, and which had disabled him.

Respondent contended at the trial that the low back condition known as spondylolisthesis, which petitioner had while in the United States Army in 1945 and 1946, and for which he was discharged, and for which he received a pension, was precisely the same condition which petitioner had at the time of the trial, and which petitioner sought to attribute to the alleged accident of January 23, 1958.

Petitioner objected to the filing of respondent's Special Plea No. 1, and respondent's Amended Special Plea No. 1, but the Court overruled said objections and permitted said Special Pleas to be filed.

Thereupon the case was tried before a jury and when all of the evidence had been introduced, respondent moved the Court to direct the jury to find a verdict in favor of respondent, on the ground and for the reason that petitioner's employment with respondent had been procured by fraudulent representations with respect to petitioner's health, physical condition, prior illnesses and accidents, prior Army service and medical discharge, and that such fraudulent representations had a direct causal connection with the injuries with which petitioner then claimed to be suffering.

The Court sustained respondent's motion to instruct the jury to find for respondent on the ground that petitioner had fraudulently procured his employment with respondent, and the Court's opinion appears on pages 1409-1421 of the transcript of the proceedings in the trial court. On page 1421 of said transcript, the Court said:

> "Now, you gentlemen (petitioner's attorneys) were taken as much by surprise in this case as all these doctors, (doctors to whom petitioner had made false statements pertaining to his previous low back disability) and doctors from the Railroad. This man didn't even tell you his back—he had a bad back condition. It is very obvious that you didn't know that until very late in this trial. I do like my lawyers and have a lot of hesitancy in directing any of these verdicts, but I don't have any sympathy for Carl Still in this case because I think he has lied completely all through this case."

STATEMENT OF FACTS

1. PETITIONER'S EMPLOYMENT BY RESPONDENT AND HIS ALLEGED INJURY OF JANUARY 23, 1958

Petitioner was employed by respondent as a yard brakeman on July 24, 1951, after having filled out, *unassisted*, and signed, a written Application for Employment (Tr. 640, 1060-1) and having been examined by respondent's medical examiner. During this examination the medical examiner asked petitioner certain questions pertaining to his previous military service, medical discharge, illnesses, injuries, etc., and wrote down petitioner's answers on a card furnished for that purpose, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (Tr. 708; R. 1679). The Application for Employment referred to was admitted in evidence as Defendant's Exhibit No. 4 (Tr. 641; R. 1678).

Petitioner continued working for respondent as a yard brakeman until January 23, 1958, the date of his alleged injury, except during the period October 1956 to November 18, 1957. In October, 1956, petitioner was dismissed from service for deserting his crew (Tr. 493). He was held out of service by respondent until petitioner's labor organization, The Brotherhood of Railroad Trainmen, intereeded for petitioner. It was then agreed that petitioner would be *reinstated* to his job, with *seniority rights unimpaired*, but would not receive pay for time lost. (Tr. 1165-6, 1279, 1283-5, 1289). The agreement under which petitioner was reinstated is set forth in a letter from H. C. Wyatt, respondent's Vice President and General Manager, to K. H. Jones, dated November 8, 1957, Plaintiff's Exhibit No. 21, Tr. 1326, 1671. When petitioner was reinstated he was not required to file an application

for employment, and was not required to, and did not, submit to a physical examination (Tr. 1242, 1287). He was, however, required to have his eyes and hearing examined (Tr. 1240-2, 1287). See record of examination, Defendant's Exhibit No. 32 (Tr. 1242; R. 1706). After petitioner was reinstated to his former employment, his seniority dated from July 24, 1951 (Tr. 1289).

Although petitioner testified that he was a regular worker and never lost any time from work on account of sickness or disability (Tr. 731-3), and that he worked eight hours a day and "five days every week" and frequently worked "overtime" (Tr. 576), and had no difficulty performing his duties as brakeman from 1951 to January 23, 1958, the date of his alleged injury, it appears from petitioner's work record from July, 1951, to February, 1958—Defendant's Exhibit No. 29 (Tr. 1068; R. 1703)—that during said entire period that petitioner was a very *irregular* worker, and lost many days in nearly every month during said period by reason of sickness, or other unexplained absences from work. In many cases petitioner's work record showed merely that petitioner was "off by permission". Petitioner did not attempt to explain why he lost so much time from work by reason of sickness, or why he was "off by permission" so frequently.

Petitioner had been employed by respondent on two previous occasions. On May 25, 1943, petitioner, having applied to respondent for work as a track laborer, was examined by Dr. J. C. Gordon, respondent's medical examiner, and was approved for such employment. During said examination Dr. Gordon asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in petitioner's answers

on a card furnished by respondent for that purpose. Defendant's Exhibit No. 8 (Tr. 721; R. 1682). However, petitioner worked only one day during the first half of June, 1943, earning $8.80 (Tr. 1002). He quit voluntarily.

Then, again, on September 27, 1948, petitioner applied to respondent for employment as section laborer, and at that time filled out and signed a written Application for Employment—Defendant's Exhibit No. 6 (Tr. 711; R. 1680). On the same date petitioner was examined by Dr. Roy E. Christie, respondent's medical examiner. Dr. Christie asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in the answers on a card furnished by respondent for that purpose—Defendant's Exhibit No. 7 (Tr. 718; R. 1681). Petitioner reported for work on September 29, 1948, at 7:00 o'clock A.M. and worked three hours and quit (Tr. 1002-3). Petitioner remembered making only *one* application for employment. He testified that respondent offered him a job, but "I didn't want a job like that. I wanted a job as a brakeman" (Tr. 720).

At the time of petitioner's alleged injuries—January 23, 1958, at 12:30 A.M.—petitioner was employed by respondent as a yard brakeman in respondent's west yard at Bluefield, West Virginia.

Prior to petitioner's alleged injury, he and several of respondent's other employees were engaged in classifying cars—breaking up a train of empties and placing them upon the classification tracks. The west yard of respondent declines toward the west and cars and trains could travel by gravity in a westerly direction.

At the time of petitioner's alleged accident, petitioner and the other brakeman were engaged in break-up and classifying a train of sixty-nine empty cars. A steam locomotive, operated by Engineer A. N. Davis, was on the east end of the train. As the train proceeded slowly in a westerly direction, the brakemen, sometimes referred to as car cutters, would cut off one, or more, cars, from the west end of the train, and a brakeman would ride each car, or cut of cars, down to the classification tracks—twelve in number—and place same upon the proper tracks. The cars traveled by gravity toward the west. It was not customary, when there were a sufficient number of brakemen to ride the cars to the classification tracks, to stop the train as each car, or cut of cars, was cut off from the train (Tr. 282, 1009). Ordinarily when the car, or cut of cars, was cut off from the train, it would drift on down the track away from the train which it had been cut off. There were sufficient riders at the time of petitioner's alleged accident, and therefore it was not intended that the train would be stopped as each car, or cut of cars, was detached (Tr. 1009).

As the train of sixty-nine empties moved slowly westward at a speed of approximately three or four miles per hour—the usual and customary speed during such switching operations (Tr. 281-2, 348-9, 1008-9)—petitioner was directed by Conductor T. A. Taylor, Jr. to get on the car in question and take it to the shop track (Tr. 500). Cars needing repairs are placed on the shop track. Petitioner got on the western most car on the train and mounted the brake step on the east end of the car, and applied the brake (Tr. 510), and petitioner's car was cut off from the train by George A. Saunders, Jr., another brakeman, and the

car drifted downgrade toward the west, and away from the train from which it had been uncoupled (Tr. 367, 519-524).

However, for some unknown reason, the train began to overtake the car, and when Conductor Taylor observed this, he gave Engineer Davis a "red board", which was the signal to stop (Tr. 1009-1010). Before Engineer Davis could stop the train, however, it coupled to the car on which petitioner was riding and petitioner claims that the coupling of the train to the car on which he was riding, threw him against the end of the car and injured him.

After the car in question was cut off to petitioner, it traveled for approximately three or three and one-half car lengths before the train overtook it and recoupled to it (Tr. 523). The distance separating the west end of the train and the car on which petitioner was riding, was at no time more than ten or fifteen feet (Tr. 229-231). George A. Saunders, Jr., a witness for petitioner, testified that "the train followed it (the car) and *gradually* caught up with it" (Tr. 375).

At the time the train coupled to the car on which petitioner was riding, petitioner was standing on the brake step on the east end of the car, looking toward the west. Petitioner admitted that after his car was cut off, and started moving west, that he did not continue to watch the train, although he knew that the train was moving in a westerly direction at the time the car was cut off, and knew that the train was following him. (Tr. 517, 735-7, 739, 740-3).

When petitioner's witness, Harry S. Manns, Jr., saw that the train was overtaking the car on which petitioner was riding, he ran to the car to prevent it from

coupling. The coupling apparatus could be operated without going between the cars. However, Manns did not reach the train in time to prevent it from coupling to the car. It did not occur to Harry Manns that petitioner was in any danger, but Manns knew that if the train coupled to the car, that the train would have to be stopped in order to uncouple the car, and that this would delay the movement of the train (Tr. 530-3).

Petitioner's witness, Orrin K. Trigg, testified that he was on the train in question at the time it coupled to petitioner's car; that he was about three or four cars to the west of the car on which petitioner was riding; that the coupling of the train to petitioner's car almost knocked him, Trigg, off of the car on which he was riding. However, Trigg was not thrown from the car and was not injured in any way.

The evidence also disclosed that all of respondent's brakeman are instructed in switching operations of this kind to keep a watch to the front and the rear, as it often happens that a train from which a car has been cut off will overtake and recouple to the car. In fact, most of the witnesses who testified on the subject said that it was the custom and practice of brakemen in situations of this kind to look both to the front and to the rear (Tr. 293-4, 297, 301, 356, 517, 522, 1017-18, 1162, 1306). As has been pointed out, petitioner admitted that he knew that the train in question was following him, but that he did not continue to watch the train (Tr. 735-7, 740, 743).

It further appeared from the evidence that respondent's rules in effect at the time of petitioner's alleged injury permitted a train traveling at a speed of four miles per hour to couple to a *standing car*; that this method of coupling was customary and perfectly safe,

and that it was not customary for the brakeman to leave the cars during such coupling operations (Tr. 1155-7, 1306-7).

The evidence further showed that whenever a train such as this stops, there is always "slack action"; that this slack action cannot be prevented, and that the brakemen can hear the slack running out in ample time to protect themselves (Tr. 1018-19, 1307-8). There is no evidence to the contrary.

Ben G. Lilly, respondent's Terminal Train Master at Bluefield, West Virginia, who had had many years experience on the railroad, testified that *prior* to petitioner's alleged injury, he had never heard of a brakeman being injured in a coupling operation such as this. (Tr. 1158) However, *subsequent* to petitioner's alleged injury, he did hear such complaints "from a few of our brakemen after Carl's injury * * *. No injury of any extent" (Tr. 1160).

Several of petitioner's witnesses testified that the noise of the coupling was unusually loud and that the train jerked severely. However, no damage whatever was done to either of the cars involved in the coupling operation.

Although petitioner claims that he was seriously injured on January 23, 1958, as a result of the above mentioned coupling operation, and that he thereby became totally and permanently disabled, he was seen and examined by Dr. D. L. Hosmer, an orthopedic surgeon on the staff of the Bluefield Sanitarium Clinic at Bluefield, West Virginia, on the day following his alleged injury. However, at that time petitioner did not complain to Dr. Hosmer of his *back*. The only complaint that petitioner made to Dr. Hosmer was with

reference to pain in his left hip and left thigh. Dr. Hosmer stripped petitioner and examined him, but said that his records did not indicate that he found any bruises, wounds, contusions or lacerations on petitioner's body. (Tr. 1257-1260). Dr. Hosmer had x-rays made of petitioner's left hip and left femur. No x-ray was made of the back, for the reason that petitioner was not complaining of his back at the time (Tr. 1259). Dr. Hosmer did not discover that petitioner had spondylolisthesis at the time of the above mentioned examination (Tr. 1264-5).

Harry S. Manns, Jr. and Orrin K. Trigg, two of petitioner's witnesses, testified that immediately following the alleged accident, that petitioner was complaining that he had hurt his hip and leg. No mention was made of injury to his back (Tr. 221, 344).

After the institution of this action petitioner was examined at the request of his attorney, by Dr. Roy M. Hoover, an orthopedic surgeon, and at that time petitioner advised Dr. Hoover that he had been knocked off of the car and fell down on the coupler, striking his back (Tr. 86-87). Following the alleged accident petitioner was also examined by Dr. R. R. Raub, another orthopedic surgeon, and petitioner admitted that he advised Dr. Raub that he was "knocked * * * completely off of the car" (Tr. 760).

As a matter of fact, petitioner was not knocked off of the car. He remained on the car until it stopped, and then climed down off of the car *unassisted* (Tr. 1014). When asked whether he had not advised Dr. Hoover that he had been knocked off of the car and struck his back on the coupler, petitioner said, "I have been telling different tales about where I fell. Just from what people tell me" (Tr. 752).

2. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

On July 24, 1951, petitioner, without assistance (Tr. 1060), filled out and filed with respondent, his application for employment as a yard brakeman (Defendant's Exhibit No. 4; Tr. 641; R. 1678).

This application was filed by petitioner with Frank J. Allen, a clerk in the office of the Terminal Train Master at Bluefield, West Virginia (Tr. 1060). Allen gave petitioner the application form, and, according to respondent's rule and custom, required petitioner to fill out and sign the application (Tr. 1060-1).

When the application was filled out by petitioner, and signed, Allen gave the application to petitioner with a note addressed to Dr. Harold E. Troup, respondent's Medical Examiner at Bluefield, requesting Dr. Troup to examine petitioner for employment (Tr. 1061). Allen testified that he had no reason to believe that any of the answers in the application were false (Tr. 1061).

Thereupon petitioner went to the office of Dr. Troup in respondent's Division Office at Bluefield, West Virginia, and was examined by Dr. Troup. Dr. Troup interrogated petitioner with reference to petitioner's medical history, his physical condition, his past accidents and illnesses, and medical discharge from the military service, and filled out a card containing the questions and petitioner's answers, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (Tr. 708; R. 1679). Dr. Troup, relying upon the truth of the answers given by petitioner, approved petitioner for employment by respondent as a yard brakeman (Tr. 1235).

Dr. Troup testified that due to the lapse of time since he examined petitioner—approximately eight years—that he had no independent recollection of examining petitioner, and had to rely on his record—the Physical Examination card—Defendant's Exhibit No. 5 (Tr. 708; R. 1679). However, Dr. Troup said that he felt sure that he followed his usual custom and practice in examining petitioner, and that this custom and practice required him to strip petitioner and examine him separate and apart from other applicants, and to require petitioner to answer the questions contained in the Physical Examination card—Defendant's Exhibit No. 5—and to record the answers as given (Tr. 1222, 1227-9).

Dr. Troup, and other officials of respondent, testified that during petitioner's employment by respondent, and prior to his alleged injury, that they had no reason to believe that he had made false answers in his application for employment, or to Dr. Troup, respondent's Medical Examiner (Tr. 1164-5, 1235, 1244, 1302-3).

Petitioner's application for employment—Defendant's Exhibit No. 4, Tr. 641, R. 1678—which was filled out, and signed, by petitioner (Tr. 640, 644-5), contains the following question and answer:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of one employer—Peerless Coal Company, Vivian, West Virginia—and stated that he had been employed by Peerless from November, 1948, to July, 1951.

The evidence shows without conflict, however, that petitioner had also been employed by Pocahontas Fuel Company (Tr. 602-3), Vera Pocahontas Coal Company (Tr. 601-3), United States Coal and Coke Company (Tr. 12-13), Winding Gulf Collieries Company (Tr. 630-1), and Koppers Coal Company (Tr. 628), but failed to disclose the names of these employers. Petitioner had worked for Pocahontas Fuel Company for one month, and then ceased work on account of "physical disability"—Defendant's Exhibit No. 19 (Tr. 834-5; R. 1693), at bottom of first page—being a statement made by petitioner to the examining physician of the Veterans Administration. Just why petitioner ceased working for the other companies above referred to does not appear, as petitioner was very vague and evasive when testifying to his employment by these various companies. Then, too, as previously shown, petitioner had also been employed by respondent in 1943 and 1948. See Defendant's Exhibit No. 6, Tr. 711, R. 1680. Defendant's Exhibit No. 7, Tr. 718, R. 1681. Defendant's Exhibit No. 8, Tr. 721, R. 1682.

The application signed by petitioner—Defendant's Exhibit No. 4, Tr. 641, R. 1678—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, *or given a medical discharge*".

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged".

It is true that petitioner received an Honorable Discharge, which was admitted in evidence as Defendant's Exhibit No. 3 (Tr. 620; R. 1677). However, on the

back of the Honorable Discharge appears the following:

> "40. Reason and authority for separation Certificate of Disability for Discharge. U P Section I AR 615-361."

Petitioner admitted, however (Tr. 488, 619-20, 649) that when he was discharged from the Army on January 31, 1946, that he received a CERTIFICATE OF DISABILITY FOR DISCHARGE, and this Certificate was admitted in evidence as Defendant's Exhibit No. 12 (Tr. 821; R. 1686), and reads in part as follows:

> "7. After careful consideration of all information obtainable and a critical examination, we find this individual unfit for military service because of:
>
> Spondylolisthesis, second-degree, severe, secondary to congenital defects of lumbo sacral junction. Manifested by chronic pain in lower back. Soldier cannot be rehabilitated to perform effective military service. Will be discharged to own care."

As above mentioned, petitioner admitted that when he was released from the Army, that he received a Certificate of Disability for Discharge. We quote from petitioner's testimony:

> "Q. When were you in the Army?
> A. I went to the Army July 18, 1945.
> Q. And when did you get out?
> A. I got out January 31, 1946.
> Q. What type of discharge did you receive?
> A. C.D.D.
> Q. What does that mean?
> A. It is a certificate of disability for discharge". (Tr. 488).

* * *

"Q. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?

A. Yes, sir.

Q. After you got out of Camp Beale?

A. Yes, sir.

Q. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge?

A. Yes, sir." (Tr. 619-620).

* * *

"Q. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?

A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check or something. * * *". (Tr. 648-9).

The application in question—Defendant's Exhibit No. 4, R. 1678—also contained the following question and answer:

"Q. 14. Have you ever been injured? If so, when and at what place. No."

This answer was false. The evidence clearly shows, and petitioner *admits*, that petitioner was involved in an automobile accident in 1941 or 1942, in which he injured his side and back, and petitioner testified that this injury was the cause of his discharge from the Army. See petitioner's testimony, Tr. 614, 619, 622-5, 645-6, 714-15, 723, 725-6, 728-9, 760.

Also see Defendant's Exhibit No. 18, Tr. 833, R. 1692, entitled ABBREVIATED CLINICAL RECORD, FORM 55 A-1, Medical Department of United States Army, consisting of nine pages, from which we quote:

"In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees, and back. Heart flutter. Since this time has had intermittent back pain, made worse by wet, cold weather. Long periods of standing or walking, or carrying wts. will cause pain. Complete physical examination is negative, except for the following:

In 1941, in automobile accident, acquired painful back, had to sleep in special position on abdomen for 3 months because of pain."

All of the foregoing appears on page 1 of the Exhibit.

We quote from page 6 of the same Exhibit:

"Patient presents a history of severely painful back which dates back to 1941. Nearly all ranges of back motion are limited and corresponding limitation of activity.

"Working diagnosis or impression: Spondylolisthesis, 2nd degree, severe, secondary to congenital defects of lumbo-sacral junction."

We also quote from page 9 of said Exhibit, under RADIOLOGIC RECORD:

"The fifth lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to ½ of the anterior posterior diameter of the body of the vertebra, indicative of spondylolisthesis".

This is exactly the same condition that petitioner had at the time of the trial of this case (Tr. 53, 664, 678-9).

The Physical Examination card prepared by Dr. Harold E. Troup on July 24, 1951, when he examined petitioner for employment—Defendant's Exhibit No.

5 (Tr. 708, R. 1679)—contains the following questions and answers:

> "Have you ever had: * * *
>
> Rheumatism:—No.
> A medical Discharge from the Military Service: No. (Honorable).
> Have you ever had a long or serious illness: No.
> What injuries have you ever received: No.
> Have you ever had Tumor, Ulcer, Physical Defect, or been operated upon? No."

All of the foregoing answers were false. Petitioner admitted that prior to his employment by respondent, that he had had a very severe attack of rheumatism which confined him to his bed for many months, and was involved in an automobile accident in 1941 or 1942, and that the rheumatism and personal injuries were the cause of his medical discharge from the United States Army (Tr. 614, 645-6, 714-15, 723, 725-6, 728-9, 759-60).

Also see Defendant's Exhibit No. 18, Tr. 833, R. 1692, ABBREVIATED CLINICAL RECORD, FORM 55 A-1, Medical Department of United States Army, page 3, which reads in part as follows:

> "History of the present illness: Patient states his back first bothered him in the summer of 1942. States he was bedfast for three or foursmonths, his complaint was diagnosed as rheumatism, he contends it was in all of his joints. Since that time his back has given him trouble. Patient states that long walks or long standing gives him constant and severe pain. His back has always given him some pain on standing."

We also call the Court's attention to Defendant's Exhibit No. 20 (Tr. 836, R. 1694), from which we read:

> "History: In 1941 this veteran had inflamatory rheumatism involving joints over the body. He was confined at that time for four months, and following recovery from this condition, he first complained of pain and weakness in the lower back. Sometime later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945, and was given a *medical discharge* in January 1946, having spent about one month of his time in the hospital, because of the complaint of back and weakness in the lower spine and in the right rib cage".

The answer to the effect that petitioner had not received a medical discharge from military service was likewise completely false, as it is entirely clear that petitioner did receive such medical discharge and *knew* that he had received it. See Defendant's Exhibit No. 12; Tr. 821; R. 1686, and petitioner's testimony (Tr. 488, 620, 649).

We also call attention to Defendant's Exhibit No. 13, Tr. 824, R. 1687, entitled Veterans Application for Pension or Compensation, which reads in part as follows:

> "3. Nature of disease or injury on account of which claim is made and date each began.
>
> Heart flutters, rheumatism in my back and where my bones join together (last part of 1942), pains in my right side, come from where I had my ribs broken (last of 1941), has got bad since I have been in the Army".

It is quite clear from this Application that petitioner was claiming a pension for disability due to

rheumatism since 1942, and personal injuries sustained in 1941.

Pursuant to the Veterans Application for Pension or Compensation filed by petitioner, the Veterans Administration, on March 21, 1946, wrote petitioner that he had been awarded a pension for disability resulting from *spondylolisthesis*. See Defendant's Exhibit No. 16, Tr. 831, R. 1690. Petitioner did not deny that he received and understood this letter, and admits that he received the pension. Later, on July 20, 1948, this pension was discontinued for the reason that there had been no "superimposed injury" on petitioner's "congenital defect during service", and "that in the absence of superimposed injury or active pathology, service connection by way of aggravation may not be granted for such developmental abnormality". See Defendant's Exhibit No. 17, Tr. 832, R. 1691.

The answer appearing in Defendant's Exhibit No. 5 (Tr. 708, R. 1679) to the effect that petitioner had never had a "physical defect", was likewise false, as it was clearly shown that petitioner has had a severe spondylolisthesis since prior to his induction into the Army in 1945.

Dr. Harold E. Troup testified that if, when he examined petitioner in July, 1951, petitioner had told him the truth concerning his spondylolisthesis, his previous accident, illnesses and disabilities, and his Army service and medical discharge, that he would not have recommended petitioner for employment as a yard brakeman (Tr. 1230-5), and that petitioner would not have been employed (Tr. 1244-5).

Numerous other doctors who testified in the case said that if petitioner had spondylolisthesis in 1945,

and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a person with a severe spondylolisthesis is easly injured. See testimony of Dr. W. Gayle Cratchfield (Tr. 671-2), Dr. Roy Hoover (Tr. 91-2), Dr. Richard Fisher (Tr. 855), Dr. Harold E. Troup (Tr. 1230-4). Dr. Hoover testified as follows:

> "In pre-employment x-ray study, if I saw a condition that looked like this (x-ray of petitioner's low back), I would advise against that man working as a brakeman, because there is too much possibility of him getting a symptomatic one *even in the ordinary activities of braking, not with any accident at all*". (Tr. 92).

The testimony of these doctors is not denied, and it is quite clear that if in July, 1951, Dr. Troup had known the true facts concerning petitioner's physical condition and past medical history that he would not have been justified in recommending petitioner's employment.

At the trial of this case petitioner contended that his spondylolisthesis was readily discoverable on medical examination and that if Dr. Troup did not discover his condition, that he should have done so. The same contention is made on page 7 of the petition for certiorari.

However, Dr. Troup testified that he gave petitioner a "screening examination" (Tr. 1226, 1246) and that he did not discover petitioner's condition.

It also appears that petitioner had taken, and *passed*, numerous physical examinations, prior to his exami-

nation by Dr. Troup, and apparently none of the examining physicians discovered petitioner's condition.

Petitioner was examined before induction into the Army (Tr. 604). He was also examined by Dr. D. L. Hosmer on the day following his alleged injury, but Dr. Hosmer did not discover his spondylolisthesis (Tr. 1257-9). Petitioner also passed physical examinations for employment by Peerless Coal and Coke Company (Tr. 489-90), Vera Pocahontas Coal Company (Tr. 601-3), Pocahontas Fuel Company (Tr. 627-8), United States Coal and Coke Company (Tr. 12-13), Koppers Coal Company (Tr. 628), and Winding Gulf Collieries Company (Tr. 630-1), and, according to his testimony, petitioner actually performed heavy work for all of these companies, except Winding Gulf.

Therefore, it is understandable why Dr. Troup, in giving petitioner a "screening examination" did not discover his true condition, particularly in view of the false answers in petitioner's application for employment, and the false answers given to Dr. Troup.

As above mentioned, petitioner was also employed by defendant as a section laborer in 1943 and in 1948. In his employment in 1943, petitioner earned $8.80 and quit work. In 1948, petitioner worked three hours and quit work (Tr. 1002-3).

Before petitioner was employed by defendant in 1943, he was examined by Dr. J. C. Gordon, respondent's Medical Examiner, and a record of this medical examination was offered in evidence as Defendant's Exhibit No. 8 (Tr. 721, R. 1682). In this examination petitioner denied that he had ever received an injury, although as shown above, he had been involved in an automobile accident *a year or two* prior to his exami-

nation by Dr. Gordon, and was complaining of this injury while in the Army in 1945 and in 1946. In fact, petitioner testified that this injury caused his discharge from the Army (Tr. 488).

Petitioner also denied to Dr. Gordon that he had ever had rheumatism. However, as above shown, petitioner admitted at the trial that he had suffered with rheumatism for several years, and his Army records, and the Veterans Administration records offered in evidence, showed clearly that petitioner had been afflicted with disabling rheumatism.

Petitioner also denied in this examination that he had ever had a "physical defect", although it is an admitted fact that he did have a severe spondylolisthesis. Petitioner did not deny that he gave such false answers to Dr. Gordon. However, he said he did not remember being examined by Dr. Gordon (Tr. 633-5).

In order to obtain employment with respondent in 1948, petitioner was required to fill out and sign a written application, which was introduced in evidence as Defendant's Exhibit No. 6 (Tr. 711, R. 1680). In this application the following question was asked:

> "9. Give record of all previous employment in date order (include military service, if any)".

In reply to this question petitioner stated that he had been employed by United States Coal and Coke Company, and Vera Pocahontas Coal Company, *but did not disclose that he had been in the Army in 1945 and 1946*, and did not disclose that he had been given a *medical discharge* from the Army on account of a severe spondylolisthesis, and had received a pension for this condition for many years. He also failed to

give the names of many former employers. In particular, he failed to state that he had been employed by Pocahontas Fuel Company for about one month, but had quit work "because of physical disability". See page 1 of Defendant's Exhibit No. 19 (Tr. 834-5, R. 1693).

In answer to question 10 in the 1948 Application, petitioner also denied that he had ever been injured. *In fact, he denied it three times.* We have heretofore shown that petitioner had been injured in an automobile accident in 1941, and that this answer was, therefore, false.

Before being accepted for employment by defendant in 1948, petitioner was also required to submit to a physical examination by Dr. Roy E. Christie, respondent's medical examiner, who examined petitioner and asked him numerous questions concerning his past medical history, and filled out a Physical Examination card, which was introduced in evidence as Defendant's Exhibit No. 7 (Tr. 718, R. 1681). In this examination —according to the card—petitioner denied that he had ever been *injured*, or that he had ever had a "physical defect". All of these answers were completely false, as above shown. Petitioner admitted (Tr. 709-11) that he *filled out*, and signed the Application for Employment in 1948, although he said that he did not *remember* making the Application for Employment dated September 27, 1948, and did not *remember* being examined for employment on September 27, 1948, or May 25, 1943 (Tr. 633-5, 709).

The three last mentioned exhibits were offered by respondent for the purpose of supporting respondent's contention that petitioner's employment by respondent in 1951 was procured by false and fraudulent

representations, and that the same false and fraudulent representations were made by petitioner in order to secure employment with respondent in 1948, and in 1943.

Although petitioner's Application for Employment dated July 24, 1951, Defendant's Exhibit No. 4, R. 1678—answer to question 10—showed that petitioner was employed by Peerless Coal Company from November, 1948, to July, 1951, and petitioner testified that he had no difficulty whatever in performing work for the various coal companies which had employed him (Tr. 492), it appears that on December 11, 1950, *about seven months prior to petitioner's employment by respondent*, that petitioner filed with the Veterans Administration an Application for Hospital Treatment or Domiciliary Care. Defendant's Exhibit No. 14, Tr. 828, R. 1688. We quote from this application:

> "39. Brief History. In 1945 had trouble with back after maneuvers. Was given a brace by Army doctors to aid back trouble.
>
> 40. Symptoms. Severe (pain) in lower back region which totally disables patient for time being. Causes tremendous discomfort."

However, the Veterans Administration, on December 15, 1950, wrote petitioner as follows:

> "Your application for hospital care has been received and we regret to advise that the medical findings fail to show definite need of hospital treatment or domiciliary care. Defendant's Exhibit 15, Tr. 829, R. 1689.

It is true that petitioner testified that when he was examined by Dr. Troup on July 24, 1951, that Dr. Troup did not ask him any questions. However, peti-

tioner also testified on several occasions that he did not *remember* what he said to Dr. Troup, or what Dr. Troup said to him during this examination (Tr. 637, 703-8). The trial of this case took place approximately *eight years* following petitioner's examination by Dr. Troup and, aside from the improbability that petitioner would remember the conversation with Dr. Troup, petitioner repeatedly admitted that he had a very poor memory (Tr. 648, 725, 763). In fact, on one occasion petitioner testified "I can't hardly remember 1958". (Tr. 648).

Petitioner's poor memory was also demonstrated by his testimony to the effect that he did not remember whether he was *examined* when he was employed by respondent in 1943 and 1948 (Tr. 634-5), whether he was involved in an automobile accident in 1941, he being fifteen years of age at the time (Tr. 645), whether he was attempting to get in a Veterans hospital during the years 1948, 1949 or 1950 (Tr. 652), whether he was examined by Dr. Karl Weier for the Veterans Administration on November 4, 1947 (Tr. 648). Although petitioner had been examined by numerous doctors prior to July, 1951, his recollection pertaining to these examinations was most vague, and he remembered nothing that was done or said during said examinations.

In explaining why he stated, in answer to question No. 14 in his Application for Employment with respondent dated July 24, 1951 (Defendant's Exhibit No. 4, Tr. 641, R. 1678), that he had never been *injured*, petitioner said that he did not *remember* the accident in which he was involved in 1941; that his mother told him about the accident (Tr. 645-6). Then, when pressed on cross-examination petitioner said "I was well

when I went with the railroad * * * I wasn't hurting * * * nothing was bothering me (Tr. 646)."

In explaining his failure to correctly answer question No. 9 contained in his Application for Employment with respondent dated September 27, 1948 Defendant's Exhibit No. 6, (Tr. 711, R. 1680) pertaining to his previous employment and *military service*, petitioner said "I don't remember filling it out" (Tr. 713). However, when his attention was called to the fact that he had previously admitted filling out the Application and signing it, he said "I didn't know they wanted my life history when you get papers like that" (Tr. 714). "I didn't know they wanted my life history from birth up, because I don't know my life history" (Tr. 715). "I didn't think it was too important". (Tr. 715).

Petitioner advised Dr. Roy M. Hoover, his own physician, on May 15, 1959, that during his entire life he had had no previous difficulty with his back (Tr. 50, 85). Petitioner advised Dr. B. R. Kinter, his own physician, a short time prior to the trial of this case, that he had had no previous back disability (Tr. 180). Dr. Kinter inquired of petitioner if he had had any difficulty with his back piror to January 23, 1958, and petitioner *denied* that he had had any previous difficulty with his back (Tr. 180).

Petitioner was examined by Dr. W. Gayle Crutchfield, a neuro-surgeon of the University of Virginia Hospital at Charlottesville, Virginia, on August 19, 1959, and on that occasion petitioner advised Dr. Crutchfield that prior to January 23, 1958, he "had never had any trouble with his back or his leg". (Tr. 661).

A short time after petitioner's alleged injury, he went to Baltimore, Maryland, and was examined by Dr. Isaac Gutman, an orthopedic surgeon. We quote from a letter dated June 17, 1958, from Dr. Gutman to Bernard Savage, who was then representing petitioner, and which letter was admitted in evidence by agreement (Defendant's Exhibit No. 33, Tr. 1381, R. 1707):

> "According to (petitioner's) history, he was the epitome of health prior to his injury. He states that he was able to bend, twist, turn, do back flips and lift a couple of hundred pounds; *he had no previous difficulty of any kind with his back*" (Tr. 1380).

Subsequent to his alleged injury of January 23, 1958, petitioner was also examined by Dr. Richard Fisher, an orthopedic surgeon of Roanoke, Virginia, and on that occasion petitioner advised Dr. Fisher that he had had no previous difficulty with his back (Tr. 59).

On November 4, 1947, Dr. Karl E. Weier of Bluefield, West Virginia, examined petitioner for the Veterans Administration for the purpose of determining whether petitioner should be admitted to a Veterans hospital (Tr. 800). At that time petitioner was complaining of "low back disability" and other ailments. See testimony of Dr. Weier, Tr. 797-803. Also see Defendant's Exhibit No. 9, Tr. 803, R. 1683, which is a record of this examination. However, petitioner refused to admit that he had been examined by Dr. Weier in November, 1947, or at any other time. In fact, petitioner said that he did not know Dr. Weier (Tr. 647-8).

Petitioner not only misrepresented his previous back condition to practically every doctor who examined him, but also misrepresented such condition to his own attorney, as will appear from the transcript of the pre-

trial proceedings in this case (Tr. 1439, 1440), from which we quote:

> "Mr. Sanders, Sr.: Well, let me ask you a question. Do you claim he never had been previously injured in the back?
>
> Mr. Walter G. Burton: I sure do.
>
> Mr. Sanders, Sr.: You claim that?
>
> Mr. Walter G. Burton: I claim that he had never been to a doctor, that he worked in the coal mines, about his back; that he could go up these ladders with his arms and without using his legs or his back, that he could go up them, he was that strong. He could go up those ladders with his arms.
>
> Mr. Sanders, Sr.: You claim he never had any previous back injuries or previous back disabilities?
>
> Mr. Walter G. Burton: *That's right; and had never been to any physician about those matters.*"

In explaining why he did not advise his own attorney as to his previous back condition, petitioner said "my back wasn't hurting me". (Tr. 758).

Petitioner not only misrepresented his physical condition to the doctors who examined him, and to his own attorney, but actually carried his misrepresentations into the court room, and repeatedly *testified* that prior to his alleged injury of January 23, 1958, his back had never given him any "pain or discomfort" (Tr. 591-2, 756, 758, 779-80). He reiterated these misrepresentations on cross-examination (Tr. 779)

On page 5 of the Petition for Certiorari reference is made to the fact that the trial court permitted respondent to file its Special Plea No. 1, and its Amended Special Plea No. 1, although counsel for respondent had previously stipulated that at the time of his injury,

petitioner was respondent's employee, and was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The Court held that the stipulation did not preclude respondent from filing said Special Pleas (Tr. 14-16, 20-40, 1405-8). After the Court had held that the stipulation did not preclude respondent from filing said Special Pleas, petitioner's counsel announced that he did not wish to move for a continuance of the case, but that he was ready for trial (Tr. 27).

SUMMARY OF ARGUMENT

1. The only substantial question involved in this case is the sufficiency of the evidence to support the judgments of the lower courts. The decisions below are not in conflict with applicable decisions of this court construing the Federal Employers' Liability Act, but are in harmony therewith. There are no special and important reasons for granting certiorari, as the law governing this case is well settled. The question involved in this case—the sufficiency of the evidence to support the judgments of the lower courts—is important only to the parties involved.

2. The essence of the complaint against respondent—see page 4 of Amended Declaration—was that petitioner was riding on the brake step of an empty coal car, when a train of cars negligently and violently collided with the car on which petitioner was riding, causing petitioner to be *knocked off* of the car, and to *fall* many feet, and to strike, and *break* his back.

However, the evidence in the case establishes without conflict that the car on which petitioner was riding was drifting by gravity toward the west, followed by a train of sixty-nine empty cars, traveling at a speed

of approximtaely three or four miles per hour—the usual and customary speed. Although petitioner knew the train was following closely, he did not watch the train. The train gradually overtook and coupled to the car on which petitioner was riding. Petitioner was not knocked off of the car. He remained on the car until it stopped and then climbed down off of the car unassisted. He remained on the job until the end of his shift. He stated to certain of his fellow employees and to his attending physician, that he had injured his left thigh and leg, but did not complain to them that he had injured his back.

Although certain of petitioner's witnesses testified that the coupling was accompanied by a loud noise, and that the coupling was unusual, and there was a severe jerk, it is undenied that the train was traveling at a speed of from three to four miles per hour—the usual and customary rate of speed in coupling operations of this kind—when the coupling occurred, and that it was customary for brakemen to remain on the cars during such coupling operations. Respondent's rule permitted a moving car or train, while traveling at a speed of four miles per hour, to couple to a *standing* car.

In view of the fact that the train and the car on which petitioner was riding were traveling in the *same* direction, and that the speed of the train did not exceed three or four miles per hour, it is obvious that the impact of the coupling movement must have been slight indeed. This was a routine coupling operation and it could not have been anticipated that such an operation would have resulted in injury to petitioner or anyone else. Therefore, respondent was not negligent.

3. Petitioner had received a medical discharge from the United States Army in 1946, for a severe, second-degree spondylolisthesis which disabled him from performing effective military service, and had received a pension for his disability for over two years. Shortly after his discharge from the Army, petitioner had quit work for Pocahontas Fuel Company on account of physical disability. On December 11, 1950—seven months before applying to respondent for work as a yard brakeman—petitioner had applied to the Veterans Administration for hospital treatment, or domiciliary care.

Petitioner knew all of the foregoing facts on July 24, 1951, when he applied to respondent for work as a yard brakeman, but deliberately concealed these facts for the purpose of deceiving respondent.

According to the testimony of four doctors who examined petitioner following his alleged injury of January 23, 1958, a person with a severe spondylolisthesis such as petitioner had is physically unfit for employment as a yard brakeman, and no medical examiner would have been justified in approving him for such employment. There is no evidence to the contrary.

Relying upon the statements made by petitioner in his written application for employment, and to respondent's medical examiner, and having no reason to believe that the statements were false, respondent employed petitioner as a yard brakeman. However, had respondent known the true facts, it would not have employed petitioner. Respondent did not discover the falsity of said representations until after the institution of this action.

Petitioner's work record from July 1951, to January, 1958, indicates clearly that petitioner was disabled

from work several days in nearly every month of said period, which corroborates respondent's contention that petitioner was physically unfit for work as a yard brakeman.

There was a direct casual connection between petitioner's alleged injury and said false representations. If petitioner was injured, the only injury he received was an *aggravation* of a pre-existing spondylolisthesis. Had he not had this spondylolisthesis, the condition could not have been aggravated and there would have been no injury.

Petitioner's fraudulent conduct is established beyond all reasonable doubt. In fact, petitioner deliberately concealed his prior physical condition from his own attending physicians, and his own attorney. It is shown beyond doubt, that petitioner has a complete disregard for the truth and is unworthy of belief. Having obtained employment with respondent by fraud, petitioner is not entitled to maintain this action.

ARGUMENT

1. THE DECISIONS BELOW ARE NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT CONSTRUING THE FEDERAL EMPLOYERS' LIABILITY ACT

The only substantial question involved in this case is the sufficiency of the evidence to support the judgments of the lower courts. The decisions below are not in conflict with applicable decisions of this Court construing the Federal Employers' Liability Act, but are in harmony therewith. There are no special and important reasons for granting certiorari, as the law governing this case is well settled. The question involved in this case—the sufficiency of the evidence to support the judgments of the lower courts—is important only to the parties involved.

2. THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE JURY IN FINDING THAT RESPONDENT WAS NEGLIGENT

This point was not argued before, or considered by the Circuit Court of Mercer County, and that court expressed no opinion with reference to the sufficiency of the evidence to justify the jury in finding that respondent was negligent.

There is little, if any, dispute with reference to the facts and circumstances surrounding plaintiff's alleged injury. Petitioner and his fellow employees were engaged in breaking up and classifying a train of sixty-nine empty cars. The car on which plaintiff was riding was drifting slowly westward toward the shop track, followed by the train of empty cars. This was as planned, as it was not customary to stop the train as each car, or cut of cars, were cut off (Tr. 1009). The evidence does not indicate the speed of the car on which petitioner was riding, but the evidence shows without dispute that the *train* was traveling at a speed of three or four miles per hour—the usual and customary speed in coupling operations of this kind (Tr. 281-2, 348-9, 1008-9). Harry S. Manns, Jr., one of petitioner's witnesses, referred to the movement of the cars as a "routine switching operation" (Tr. 348). Petitioner was on the brake step of the car in question when it was "cut off" by brakeman George A. Saunders, Jr. When the car was cut off it drifted toward the west and away from the train from which it had been cut off (Tr. 367, 519, 524). Petitioner admitted that after his car was cut off, and started moving west, that he did not continue to watch the train, although he knew that the train was moving in a westerly direction when the car was cut off, and knew that the train was following him (Tr. 517, 735-7, 739, 740-3). Petitioner's witness, George A. Saunders, Jr., who had cut the car off to

petitioner, testified that "the train followed it (the car) and *gradually* caught up with it (Tr. 375). This is not contradicted. Petitioner's witness, Harry S. Manns, Jr., observed the train overtaking the car on which petitioner was riding, and ran to the car to prevent it from coupling. However, Manns did not reach the car in time to prevent the coupling. It did not occur to Harry Manns, Jr. that petitioner was in any danger, but Manns knew that if the train coupled to the car, that the train would have to be stopped in order to uncouple the car, and that this would delay the movement of the train (Tr. 530-3).

Conductor T. A. Taylor, Jr. also observed the train overtaking the car on which petitioner was riding and it did not occur to Conductor Taylor that petitioner was in any danger. Taylor was primarily concerned with preventing the coupling which would have delayed the movement of the train (Tr. 1010-1018).

As above mentioned, petitioner observed the train following him, after his car had been cut off, and he would not deny that the train was moving *slowly* just prior to the coupling (Tr. 737). However, the train caught up with the car on which petitioner was riding and coupled to it. When the train stopped, petitioner climbed down from the car *unassisted* (Tr. 1014-15).

It further appears from the evidence that after the car in question was cut off to petitioner, it traveled only about three or three and one-half car lengths before the train overtook, and coupled to it (Tr. 523). The distance separating the train from the car was never more than from ten to fifteen feet (Tr. 229-231).

It further appeared from the evidence that respondent's rules permitted a train traveling at a speed of

four miles per hour to couple to a *standing* car. However, the car on which petitioner was riding was not a *standing* car. It was moving in the same direction, and *away* from the overtaking train.

It is quite true that several of petitioner's witnesses testified that the collision made a loud noise, or caused a severe jerk, or was unusual. However, the fact remains that this was a routine coupling operation which should not have resulted in injury to the petitioner or anyone else, and it is doubtful whether petitioner, in fact, sustained any injury whatever.

Petitioner would have the Court believe that the "effect of the accident was to separate and dislocate petitioner's spinal column"—see Petition for Certiorari, page 4. However, Harry S. Manns, Jr. and Orrin K. Trigg, two of petitioner's witnesses, testified that immediately following the alleged accident, that petitioner was complaining that he had injured his *hip* and *leg*. Petitioner did not complain of injury to his *back* (Tr. 221, 344). Then, too, the day following his alleged injury, petitioner was examined by Dr. D. L. Hosmer, an orthopedic surgeon, and on that occasion petitioner did not complain to Dr. Hosmer of his *back*. The only complaint petitioner made to Dr. Hosmer was with reference to pain in his left hip and left thigh. Dr. Hosmer stripped petitioner and examined him, but said that his records did not indictae that he found any bruises, wounds, contusions or lacerations on petitioner's body (Tr. 1257-1260).

If, as petitioner contends, the "effect of the accident was to separate and dislocate petitioner's spinal column", then it is obvious that this injury would have immediately caused excruciating pain and would have completely disabled petitioner. This seems obvious

without medical testimony. However, Dr. D. L. Hosmer testified that if the accident in question caused, or substantially aggravated petitioner's spondylolisthesis, that he would have felt immediate pain in the back and would probably have been disabled (Tr. 1268-9, 1274). To the same effect, see testimony of Dr. W. Gayle Crutchfield (Tr. 673).

If the train in question was traveling at a speed of from three to four miles per hour—and there is no evidence to the contrary—and the car on which petitioner was riding was moving in the same direction as the train, then it is obvious that the impact of the coupling must have been slight indeed. Certainly, if the train was traveling not over three or four miles per hour, and the car on which petitioner was riding was moving in the same direction, and away, from the train, then it is inconceivable how the coupling could have injured petitioner.

When petitioner's car was cut off and started drifting westward, it was thought that the car would exceed the speed of the following train and that there would be no recoupling. However, for some unknown reason, the train overtook and coupled to the car. This recoupling could be explained by the fact that petitioner, while drifting toward the shop track, applied the brake on his car too tightly, and thus caused the car to slow up and be overtaken by the following train. Petitioner *admitted* that he did apply the brake, and it seems clear that petitioner was actually applying the brake when the coupling took place. See petitioner's testimony Tr. 510, 738. The application of the brake by petitioner appeared to Conductor T. A. Taylor, Jr. as a logical explanation for the recoupling (Tr. 1038).

3. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

(a) Petitioner Was Not Physically Fit for Work as a Yard Brakeman. No Medical Examiner Would Have Been Justified in Approving Petitioner for Such Employment

Due to the strenuous nature of a yard brakeman's work, the physical qualifications for such work were considered by respondent to be the highest of any of its employees (Tr. 1216-17, 1226).

The evidence showed clearly and conclusively that on January 31, 1946, petitioner was discharged from the United States Army for the reason that he had a severe, second-degree, spondylolisthesis, manifested by chronic pain in the lower back, and that he could not be rehabilitated to perform effective military service. See petitioner's Certificate of Disability for Discharge, Defendant's Exhibit No. 12, Tr. 821, R. 1686.

For confirmation of the diagnosis made by the Army doctors when petitioner was given a disability discharge, see

Defendant's Exhibit No. 13, Tr. 824, R. 1687

Defendant's Exhibit No. 14, Tr. 828, R. 1688

Defendant's Exhibit No. 17, Tr. 832, R. 1691

Defendant's Exhibit No. 18, Tr. 833, R. 1692, pages 5, 6, 8 and 9

Defendant's Exhibit No. 19, Tr. 834-5, R. 1693, pages 1 and 7

Defendant's Exhibit No. 20, Tr. 836, R. 1694

Defendant's Exhibit No. 23, Tr. 839, R. 1697

Some of these exhibits show that since 1941 petitioner had suffered with seriously disabling rheumatism, and a seriously disabling personal injury. See:

Defendant's Exhibit No. 13, Tr. 824, R. 1687

Defendant's Exhibit No. 18, Tr. 833, R. 1692, pages 1 and 3

Defendant's Exhibit No. 20, Tr. 836, R. 1694, page 1

We quote from Defendant's Exhibit No. 20, Tr. 836, R. 1694;

> "HISTORY: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1943 and was given a *medical discharge* in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage."

The above mentioned HISTORY given by petitioner to the Veterans Administration doctor, shows conclusively that petitioner then knew that he had received a medical discharge from the Army in January 1946.

We quote from Defendant's Exhibit No. 18, Tr. 833, R. 1692, first page:

> "In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees and back. Heart flutter. Since this time has had intermittent back pain, made worse with wet, cold weather. Long periods of standing or walking or carrying wts. will cause pain.

Complete physical examination is negative except for the following:

In 1941, in automobile accident acquired painful back, had to sleep in special position on abdomen for 3 mon. because of pain."

We also quote from VETERANS APPLICATION FOR PENSION OR COMPENSATION filed by petitioner with the Veterans Administration in February, 1946:

"2 Nature of disease or injury on account of which claim is made and date each began.

Heart flutters, rheumatism in my back and where my bones join together (last part of 1942). Pains in my right side, come from where I had my ribs broken (last of 1941). Has got bad since I have been in the Army." (Tr. 824, R. 1687)

Petitioner testified repeatedly that the injuries which he received to his side in 1941 caused his discharge from the Army (Tr. 614, 619, 622-4, 625).

In testifying with reference to his rheumatism, petitioner said:

"When I had rheumatism I hurt all over. Everything hurt. I couldn't hardly stand to look at daylight; it hurt that bad" (Tr. 760).

* * * "A. I had this rheumatic fever and it was pretty bad when I had it. I don't remember.

Q. 551. It was bad in your back, too, wasn't it?

A. It wasn't bad in my back; it was bad all over.

Q. 552. But you had it in your back, too, didn't you?

A. I had it all over.

Q. 553. But you had it in your back, too, didn't you?

A. I had it all over. That's in my legs and arms and all over.

Q. 554. And back?
A. All over.
Q. 555. You hate to say back, don't you?
A. I had it all over.
Q. 556. All right. You just won't say you had it in your back?
A. My back is part of me, and I had it all over.
Q. 557. But you did say you had it in your back in your application, didn't you?
A. I don't remember." Tr. 728-9.

Dr. Harold Troup (Tr. 1230-4), Dr. W. Gayle Crutchfield (Tr. 671-2), Dr. Roy M. Hoover (Tr. 68-9, 91-2), and Dr. Richard Fisher (Tr. 855) testified in substance that a person with a severe spondylolisthesis such as petitioner had was *unfit* for employment as a yard brakeman, and that a medical examiner would not be justified in approving petitioner for such employment.

We quote from the testimony of petitioner's witness, Dr. Roy M. Hoover:

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a smyptomatic *one even in the ordinary activities of braking, not with any accident at all.*" Tr. 92.
> * * *
> "A. The thing I am stating is this: that if in a pre-employment examination of an individual who is having no symptoms, if I saw X-rays like this, I would advise against employing that man as a yard brakeman because of the danger of getting a painful back out of it." Tr. 92.

It, therefore, clearly appears that petitioner, on July 24, 1951, was *unfit* for work as a yard brakeman, and

that no medical examiner would have been justified in approving him for such employment. So far as the evidence shows, there was no shortage of yard brakemen at that time, and no reason appears why Dr. Troup would have approved petitioner for employment as a yard brakeman if he had known the the true facts.

Petitioner's WORK RECORD for the period July 24, 1951, to January 23, 1958—Defendant's Exhibit No. 29 (Tr. 1068, R. 1703) strongly corrobortaes our contention that on July 24, 1951, petitioner was *unfit* for employment as a yard brakeman. This WORK RECORD shows that hardly a month passed during the period July 24, 1951, to January 23, 1958, that petitioner was not off from work for several days on account of "sickness", or other unexplained absences. Certainly no physically fit employee would have lost as much time from work on account of "sickness", and other unexplained absences, as petitioner lost. Petitioner, in attempting to impress the jury that he was physically fit, *denied* that he had ever lost any time from work on account of sickness (Tr. 731-2). This testimony was, of course, completely false.

(b) Petitioner Knew That He Had Received a Medical Discharge From the Army, for Spondylolisthesis; and Knew That He Had Been Seriously Disabled With Rheumatism and by a Personal Injury

Petitioner was inducted into the United States Army on July 18, 1945, and was discharged on January 31, 1946. He received a Certificate of Disability for Discharge, which is commonly known as a disability or medical discharge. This much is entirely clear.

It is equally clear that petitioner *knew* on July 24, 1951, when he was examined by respondent's medical

examiner, that he had received a medical discharge. We quote from petitioner's testimony:

"Q. 8. When were you in the Army?
A. I went to the Army July 18, 1945.
Q. 9. And when did you get out?
A. I got out January 31st, 1946.
Q. 10. What type of discharge did you receive?
A. C.D.D.
Q. 11. What does that mean?
A. It's a Certificate of Disability for Discharge.
Q. 12. Was it an honorable discharge?
A. Yes, sir.
Q. 13. Why did you get a military discharge, if you know?
A. I had trouble with my side.
Q. 14. With your side?
A. Yes, sir." Tr. 487-488.

"Q. 184. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?
A. Yes, sir.
Q. 185. After you got out of Camp Beale?
A. Yes, sir.
Q. 186. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge, didn't they?
A. Yes, sir." Tr. 619-620.

"Q. 370. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?
A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check, or something. They tell me about it in the Army. I don't know." Tr. 648-649.

It also appears that on March 29, 1948, petitioner was examined by a Veterans Administration physician and that he gave the examiner the following history:

"Sometime later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a *medical discharge* in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness *in the lower spine*, and in the right rib cage." See Defendant's Exhibit No. 20, Tr. 836, R. 1694.

We wish to emphasize the fact that petitioner testified (Tr. 488) that he received his discharge by reason of the trouble with his *side*.

Therefore, it is quite clear from the above mentioned exhibits, and petitioner's testimony that when he was examined by respondent's medical examiner on July 24, 1951, petitioner *knew* that he had served approximately six months in the Army and had received a medical discharge; and knew exactly why he had received this medical discharge. He also knew full well that he had suffered for many years with very disabling rheumatism, and with a disabling personal injury. As above shown, he attributed his discharge from the Army to this personal injury. No one except the most gullible could possibly believe that the petitioner was unaware of these facts when he applied for employment with respondent on July 24, 1951.

(c) Petitioner Fraudulently Concealed From Respondent's Medical Examiner His Past Military Service and Medical Discharge; and That He Had Been Seriously Disabled With a Spondylolisthesis, Rheumatism, and a Personal Injury

On July 24, 1951, petitioner, *without assistance*, filled out and signed an application for employment as a yard brakeman. Defendant's Exhibit No. 4, Tr. 641, R. 1678.

According to this Application, petitioner had been through grade school, and two years of high school.

He had attended vocational school for twenty months (Tr. 599).

The application was filed by petitioner with Frank J. Allen, a clerk in the office of the Terminal Train Master at Bluefield, West Virginia (Tr. 1060). Allen gave petitioner the application form, and, according to respondent's rule, required petitioner to fill out, and sign, the application (Tr. 1060-1).

Thereupon petitioner delivered the application to Dr. Troup, respondent's medical examiner, at Bluefield, and was examined by Dr. Troup. Dr. Troup interrogated petitioner with reference to petitioner's medical history, his physical condition, his past accidents and illnesses, and medical discharge from the military service, and filled out a card containing the questions and petitioner's answers, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (Tr. 708, R. 1679). Dr. Troup, relying upon the answers given by petitioner, approved petitioner for employment by respondent as a yard brakeman (Tr. 235).

Dr. Troup testified that due to the lapse of time since he had examined petitioner—approximately eight years—that he had no independent recollection of examining petitioner, and had to rely on his record—the physical examination card above referred to. However, Dr. Troup said that he felt sure that he followed his usual custom and practice in examining petitioner, and that this custom and practice required him to strip petitioner and examine him separate and apart from other applicants, and to require petitioner to answer the questions contained in the physical examination card (Tr. 1222, 1227-9).

Petitioner's application for employment—Defendant's Exhibit No. 4 (Tr. 641, R. 1678)—contains the following question:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of one employer—Peerless Coal Company, Vivian, West Virginia—and stated that he had been employed by Peerless from November, 1948, to July, 1951.

The evidence shows without conflict, however, that in addition to Peerless Coal Company, petitioner had been employed by Pocahontas Fuel Company, Koppers Coal Company, Vera Pocahontas Coal Company, United States Coal and Coke Company, and Winding Gulf Collieries Company. It further appears that petitioner had also been employed by the respondent in 1943 and 1948, but on both occasions had walked off of the job after a few hours' work. It further appeared that petitioner was employed by Pocahontas Fuel Company about one month, and quit because of "physical disability". Defendant's Exhibit No. 19 (Tr. 834-5, R. 1693).

Had petitioner disclosed his employment by Pocahontas Fuel Company and his employment by respondent in 1943 and 1948, it is extremely doubtful whether petitioner would have been employed by respondent on July 24, 1951. Petitioner realized this and deliberately concealed his employment with Pocahontas Fuel Company and the other coal companies, and his two previous employments by respondent.

The application signed by petitioner—Defendant's Exhibit No. 4 (Tr. 641, R. 1678)—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, or given a medical discharge".

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged".

Having filled in all of the answers to the questions contained in this Application, petitioner necessarily *read* the words "or given a medical discharge". Petitioner did not testify that he did not read and understand the words "or given a medical discharge", and he did not testify that he did not understand what a "medical discharge" was.

To the contrary, petitioner *knew*, as we have heretofore pointed out, that he had received a medical discharge from the Army. Petitioner knew, of course, that if he had informed respondent that he had received a medical discharge from the Army, and that he had received a pension until the summer of 1948, that his Application would not have been approved. Therefore, petitioner told a ***half*** truth and answered "U. S. Army. Honorable Discharged".

Question 14 of the Application for Employment (Defendant's Exhibit No. 4 (Tr. 641, R. 1678) and the answer thereto, read as follows:

> "14. Have you ever been injured? If so, when and at what place. No."

This answer was completely false. Petitioner was admittedly injured in 1941, and he testified that this

injury was the cause of his discharge from the Army (Tr. 488).

During the course of his cross-examination, petitioner denied personal knowledge of the 1941 automobile accident and his resulting personal injuries, and said that his mother had told him about the accident (Tr. 645). However, when petitioner was forced to admit that he had received personal injuries in the 1941 automobile accident, he finally explained that the reason he did not disclose this injury in the Application in question, was that he "wasn't hurting"; that "nothing was bothering" him at the time (Tr. 646).

We have previously pointed out (Tr. 756, 1439, 1440) that petitioner concealed from his own attorney the fact that he had had trouble with his back prior to his alleged injury of January 23, 1958. In explaining why he had concealed his previous low back condition from his own attorneys, petitioner said: "my back wasn't hurting me" (Tr. 758).

The fact that petitioner was not "hurting" and that "nothing was bothering" him, when he applied to respondent for employment, did not justify him in falsely stating in answer to question 14 of the Application that he had never been injured. Explanations of this kind are not sufficient to justify or excuse willful and deliberate misrepresentations. Had petitioner truthfully answered question 14 in the Application, then it seems most logical to assume that further questions, truthfully answered by petitioner, would have disclosed that petitioner was physically unfit for employment as a yard brakeman, and he would not have been so employed.

The Physical Examination card prepared by Dr. Troup, respondent's medical examiner, on July 24,

1951, Defendant's Exhibit No. 5 (Tr. 708, R. 1679), contained the following questions and answers:

> "Have you ever had:
> Rheumatism? No.
> A medical discharge from the military service? No. (Honorable).
> Have you ever had a long or serious illness? No.
> What injuries have you ever received? No.
> Have you ever had tumor, ulcer, physical defect, or been operated upon? No."

As heretofore clearly shown, all of the foregoing answers were completely false, and petitioner *knew* they were false when he gave them.

Petitioner, of course, realized the materiality and seriousness of these false answers, and was finally driven to the denial that Dr. Troup had asked him any of the questions appearing on the Physical Examination card (Tr. 704).

Petitioner went so far (Tr. 637) as to say that he and several other applicants for work were stripped and examined by Dr. Troup at the same time (Tr. 637). However, other portions of petitioner's testimony disclose rather clearly that petitioner did not *remember* what Dr. Troup said to him, or what he said to Dr. Troup during this examination (Tr. 637, 703-8).

We quote from petitioner's testimony:

> "Q. 435. I asked you this morning about when Dr. Troup examined you, and you said at that time you didn't remember what he said to you or what you said to him, didn't you?
> A. You said while he was examining me, what did he say to me. *I don't remember.* But you have got some questions with "No" there I don't know anything about.

Q. 436. Now, I understand you to say when Dr. Troup examined you on July 24th, 1951, he didn't ask you one single question. Is that your reply?

A. I didn't set up and talk to Dr. Troup and answer those questions on that paper there.

Q. 437. What questions?

A. *Whatever you've got there.*

Q. 438. Did he ask you any questions at all? Did he say anything to you?

A. He examined us and give us this—look at these different lights, and things like that, and he examined us, and we signed some papers and went to the Yard Office.

Q. 439. Did he ask you any questions?

A. *We talked.* We wasn't in there in silence as he examined me.

Q. 440. What did you talk about, you and Dr. Troup?

A. What did we talk about?

Q. 441. Yes. What did you talk about?

A. Just talk.

Q. 442. What was said? What did he say to you and what did you say to him?

A. The main thing the doctor was doing was examining us. And we signed some papers and went down and marked up for work." (Tr. 706-7).

"Q. 445. I am not asking you about that. You said when you went down and you were examined by Dr. Troup, that you talked to Dr. Troup. Did you say that?

A. I talked with Dr. Troup. You don't walk into a doctor's office and not say, "Good Morning," or "Good evening," or anything; you say something.

Q. 446. What I am trying to get, if you remember, what did you say to Dr. Troup and what did he say to you?

A. Word for word, our conversation while I was in there?

"Q. 447. Yes.

A. I wouldn't know. He didn't have that paper asking any questions, if that's what you mean, and I answered it." Tr. 707-8).

We desire again to emphasize that this case was tried in October 1959—nearly *eight years* after petitioner was examined by Dr. Troup. Petitioner *passed* the examination and was given employment. Apparently nothing occurred during this examination which would cause petitioner to remember the conversation he had with Dr. Troup. Petitioner admitted repeatedly that his memory was poor (Tr. 648, 725, 763) and on one occasion said "I can't hardly remember 1958". Tr. 678).

Petitioner's admissions that his memory was very poor, are strongly corroborated by the fact that during his testimony petitioner frequently failed to remember many vital and material matters, which any person with a normal memory would have remembered. Furthermore, no reason appears why Dr. Troup would be so derelict in his duty that he would fail to ask petition any of the questions appearing on the Physical Examination card. Dr. Troup testified that he had no independent recollection of examining petitioner, and had to rely on his record—the Physical Examination card—Defendant's Exhibit No. 5 (Tr. 708, R. 1679). However, Dr. Troup said that he felt sure that he followed his usual custom and practice in examining petitioner and that this custom and practice, and respondent's rule, required him to strip petitioner and examine him separate and apart from the other applicants, and to require petitioner to answer the questions contained in said Physical Examination card.

We, therefore, submit that petitioner's testimony to the effect that Dr. Troup examined petitioner and

several other applicants in the same room and at the same time, and that Dr. Troup did not ask petitioner or the other applicants any of the questions appearing on the Physical Examination card, is so highly improbable, so inconsistent with other portions of petitioner's testimony, and so manifestly false, that no reasonably intelligent man could give credence to such testimony. The testimony is *incredible* as a matter of law, and the rule is well settled that incredible testimony should be disregarded.

And, finally, in connection with this phase of the case, we desire to again call the Court's attention to the fact that on December 11, 1950, about seven months prior to petitioner's last employment by respondent, that petitioner filed with the Veterans Administration an Application for Hospital Treatment or Domiciliary Care. Defendant's Exhibit No. 14 (Tr. 828, R. 1688). Certainly petitioner, as bad as his memory is, could not have forgotten on July 24, 1951, that, seven months previously, he had filed said Application for Hospital Treatment or Domiciliary Care.

(d) Petitioner Also Fraudulently Procured Employment With Respondent in 1943 and 1948

Strongly supporting respondent's contention that petitioner fraudulently procured employment with respondent on July 24, 1951, is the clearly established fact that petitioner also fraudulently procured employment with respondent in 1943 and 1951.

Before petitioner was employed by respondent in 1943, he was examined by Dr. J. C. Gordon, respondent's medical examiner, and a record of this medical examination was offered in evidence as De-

fendant's Exhibit No. 8 (Tr. 721, R. 1682). In this examination petitioner denied that he had ever received an injury, that he had ever had rheumatism, or that he had ever had a "physical defect". As above shown, all of these answers were false. In fact, the automobile accident in which petitioner was injured and which he claimed caused his discharge from the Army (Tr. 488) occurred in 1941, just *two years* prior to his examination by Dr. Gordon. No one could possibly believe that petitioner had forgotten this automobile accident, and his resulting injuries, when he was examined by Dr. Gordon.

In order to obtain employment with respondent in 1948, petitioner was required to fill out and sign a written Application, which was introduced in evidence as Defendant's Exhibit No. 6 (Tr. 711, R. 1680). In this Application the following question was asked:

> "9. Give record of all previous employment in date order (include military service, if any)."

In reply to this question petitioner stated that he had been employed by United States Coal and Coke Company, and Vera Pocahontas Coal Company, but did not disclose that he had been in the Army in 1945 and 1946, and that he had been given a medical discharge from the Army on account of a severe spondylolisthesis, and had received a pension for this condition for over two years.

In explaining his failure to correctly answer question No. 9 contained in his Application for Employment with respondent, dated September 27, 1948, Defendant's Exhibit No. 6 (Tr. 711, R. 1680), pertaining to his previous employment and military service, petitioner said, "I don't remember filling it

out" (Tr. 713). However, when his attention was called to the fact that he had previously admitted filling out the Application, and signing it, he said "I didn't know they wanted my life history when you get papers like that" (Tr. 714). "I didn't know they wanted my life history from birth up, because I don't know my life history" (Tr. 715). "I didn't think it was too important" (Tr. 715).

Before being accepted for employment by defendant in 1948, petitioner was also required to submit to a physical examination by Dr. Roy E. Christie, respondent's medical examiner, who examined petitioner and asked him numerous questions concerning his past medical history, and filled out a Physical Examination card, which was introduced in evidence as Defendant's Exhibit No. 7, (Tr. 718, R. 1681). In this examination—according to the card which was signed by petitioner—petitioner denied that he had ever been *injured*, or that he had ever had a "physical defect". All of these answers were completely false, as above shown. Petitioner admitted (Tr. 709-11) that he filled out, and signed, the Application for Employment in 1948, although he said that he did not *remember* making this Application. He also did not remember being examined for employment on September 27, 1948, or May 25, 1943 (Tr. 633-5, 709). However, he did not deny these examinations.

The fact that petitioner made false representations to respondent in obtaining employment in 1943 and 1948, strongly corroborates respondent's contention that petitioner fraudulently obtained employment in 1951.

(e) If Dr. Troup, Respondent's Medical Examiner, Had Known the Truth Concerning Petitioner's Military Service and Medical Discharge; and His Severe Spondylolisthesis, Rheumatism, and Personal Injury, He Would Not Have Recommended Petitioner for Employment

It would be preposterous to assume that Dr. Troup would have recommended petitioner for employment as a yard brakeman, or that petitioner would have been so employed, if petitioner had truthfully answered the questions in his Application for Employment, and had made truthful answers to Dr. Troup.

Dr. Troup testified that if when he examined petitioner in July, 1951, petitioner had told him the truth concerning his spondylolisthesis, his previous accident, illnesses and disabilities, and his Army service and medical discharge, that he would not have recommended petitioner for employment as a yard brakeman (Tr. 1230-5), and that petitioner would not have been so employed (Tr. 1244-5). If Dr. Troup, *knowing* the truth about petitioner, had recommended petitioner for employment as a yard brakeman, then Dr. Troup would have been guilty of a gross violation of his duty to respondent. Certainly no experienced medical examiner would have approved petitioner for work as a yard brakeman, or for other strenuous work, for the obvious reason that petitioner's condition could quite easily be aggravated, and claims for damages could naturally be expected.

Numerous other doctors who testified in the case said that if petitioner had spondylolisthesis in 1945 and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a person with a severe

spondylolisthesis is easily injured (Tr. 91-2, 671-2, 855, 1230-4).

On page 7 of the Petition for Certiorari, it is said, "since petitioner's spondylolisthesis was readily discoverable on medical examination, respondent's physician either failed to see what was readily apparent or chose to ignore it".

We disagree with this statement. Dr. Troup testified that he gave petitioner a "screening examination" (Tr. 1226, 1246), and that he did not discover petitioner's condition. It also appears that petitioner had taken, and *passed*, numerous physical examinations prior to his examination by Dr. Troup, and apparently none of these examining physicians discovered petitioner's condition. Petitioner was examined before being inducted into the Army (Tr. 604). He was examined by Dr. D. L. Hosmer on the day following his alleged injury, but Dr. Hosmer did not discover, spondylolisthesis (Tr. 1257-9). Petitioner also passed physical examinations for employment with Peerless Coal and Coke Company (Tr. 489-90), Vera Pocahontas Coal Company (Tr. 601-3), Pocahontas Fuel Company (Tr. 627-8), United States Coal and Coke Company (Tr. 12-13), Koppers Coal Company (Tr. 628), and Winding Gulf Collieries Company (Tr. 630-1). In addition to this, petitioner was examined by respondent's medical examiners in 1943, and 1948. None of these doctors discovered petitioner's spondylolisthesis. Therefore, it is understandable why Dr. Troup, in giving petitioner a "screening examination", did not discover his true condition, particularly in view of the false answers in petitioner's Application for Employment, and the false answers given to Dr. Troup.

(f) There Was a Direct Causal Connection Between Petitioner's False Representations and His Alleged Injuries

The evidence is clear that when petitioner was employed by respondent on July 24, 1951, that he had a severe, second-degree spondylolisthesis, and that he had received a medical discharge for this condition, and a pension for approximately two years.

We quote from page 9 of Defendant's Exhibit No. 18 (Tr. 833, R. 1692):

> "RADIOLOGIC RECORD
>
> The 5th lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to ½ of the anterior posterior diameter of the body of the vertebra indicative of spondylolisthesis."

Dr. W. Gayle Crutchfield, who was head of the Department of Neuro-surgery at the University of Virginia Hospital, Charlottesville, Virginia, testified (Tr. 678-9) that the condition shown in the above mentioned X-ray report was *essentially* the same as petitioner had at the time of the trial. There is no evidence to the contrary.

Therefore, it is apparent that the only injury which petitioner could have sustained in the alleged accident, was an aggravation of his pre-existing spondylolisthesis.

For many reasons heretofore pointed out, it is questionable whether petitioner sustained any injury. The train which coupled to the car on which petitioner was riding was traveling at a speed of from three to four miles per hour—the usual and customary speed. The car on which petitioner was riding was gradually overtaken and coupled to by the train. When the train stopped, petitioner climbed down off of the

car unassisted. He complained of his hip and leg to his fellow employees, Trigg and Manns (Tr. 221, 344), but he did not complain of his *back*. The following day petitioner was examined by Dr. D. L. Hosmer and he did not then complain of his *back* to Dr. Hosmer (Tr. 1264-5). Therefore, if petitioner was actually injured, the injury must have been slight indeed, and probably would not have produced any disability, but for the pre-existing spondylolisthesis.

Therefore, it seems clear that there was a direct causal connection between petitioner's false representations and his alleged injury. This conclusion is borne out by the testimony of Dr. Roy M. Hoover, a witness for petitioner (Tr. 92):

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic *one even in the ordinary activities of braking, not with any accident at all.*
>
> * * *
>
> "A. The thing I am stating is this: that if in a pre-employment examination of an individual who is having no symptoms, if I saw X-rays like this, I would advise against employing that man as a yard brakeman because of the danger of getting a painful back out of it."

Therefore, we submit that the trial court was clearly right when he said (Tr. 1419-20), "I can't imagine a stronger case of direct causal connection between the misrepresentations and the injuries complained of than we have in this particular case."

THE LAW GOVERNING THE CASE

The trial court in directing a verdict in favor of respondent, relied principally upon the case of *Minneapolis, St. Paul & S.S.M. Ry. Co.* v. *Rock*, 279 U.S. 410, 73 L. Ed. 766. We submit that the *Rock* case is clearly in point and supports the judgment of the trial court.

The court, in the course of its opinion in the *Rock* case, said:

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.
>
> * * *
>
> "Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means.

> While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and *physical condition* to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and it other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy."

The facts in the *Rock* case, and in the case now under consideration are different, but the principle involved in both cases is exactly the same.

In the *Rock* case the plaintiff perpetrated a fraud on the railway company by having another person impersonate him and in his place to submit to the required examination. In the case now under consideration, petitioner himself submitted to the examination, but in his Application for Employment, and in reply to questions by respondent's medical examiner, he made false answers with reference to his Army service, medical discharge, physical condition, illnesses and accidents. These fraudulent representations deceived respondent and enabled petitioner to secure employment with respondent.

The only difference between the *Rock* case and the case now under consideration is the *type of fraud* perpetrated. In both cases the employees obtained their employment by fraud.

In fact, the case now under consideration is even stronger in favor of the employer than the *Rock* case, in view of the fact that in the *Rock* case there was no connection whatever between the employee's fraudulent conduct and the *accident*, or the employee's *injuries*, whereas in the case now under consideration, there was a direct causal connection between petitioner's fraudulent conduct and his alleged injuries.

The Petition for Certiorari refers to the case of *Minneapolis, St. P. & S. S. M. R. Co.* v. *Borum*, 286 U.S. 447, 76 L. Ed. 1218, and says, page 14:

> "In Borum, the same railroad attempted to extend the principle of the Rock case to a very different fact situation—one strikingly similar to that involved here. This Court squarely rejected the attempt and made clear how limited is any rule to be derived from the Rock case.

However, the *Borum* case is not "strikingly similar" to the case here involved. In fact, it is entirely different, as will be seen from the following exerpts from the Court's opinion:

> "It was a general practice of men, over the age specified in the rule, when applying for such work on the railroads of defendant and other carriers in the Northwest falsely to represent their ages to be within the specified limit, and that practice was known to the defendant. The arbitrators were unable to find whether defendant knew plaintiff was over 45 years. They did not find, nor does the evidence require a finding, that defendant was deceived by plaintiff's false statements or that it accepted his application because of or in reliance upon them. The application was not rejected within 30 days and, under rule 22, must be deemed to have been finally accepted. Under the terms of the contract of hiring, defendant did not

without more have the right to remove plaintiff from its service on account of such misrepresentation."

* * *

"Neither his age nor his physical condition contributed to cause his *injury*."

(In fact, his age did not contribute to either the *injury or the accident*.)

* * *

"Here, defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any material bearing upon the physical condtion it required. The arbitrators did not find, and the evidence does not show, that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition or that, if he had given his real age, the surgeon would have found otherwise."

* * *

"Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees."

In the case now under consideration it clearly appears that

(1) the representations made by petitioner were material, and false. They were known to be false by petitioner and were made for the purpose of deceiving respondent;

(2) It was not the general practice of respondent's employees to make such false representations and, of course, respondent had no knowledge of any such practice, neither did respondent have knowledge of the falsity of petitioner's representations;

(3) Respondent was deceived by the false representations. Had it known the truth concerning petitioner, it would not have employed petitioner. Petitioner's fraud was a substantial factor in the hiring;

(4) Petitioner's physical condition was such as to make his employment inconsistent with respondent's proper policy and its reasonable rules to insure discharge of its duty to select fit employees;

(5) Respondent had the right to dismiss petitioner from its service at any time for such false representations—Defendant's Exhibit No. 4 (Tr. 641, R. 1678).

(6) There was a direct causal connection between petitioner's fraudulent conduct and his alleged injuries.

For the foregoing reasons it is entirely clear that the *Borum* case has no application whatever to the case now under consideration and does not indicate in any way that the judgments of the lower courts were erroneous.

In the case of *Casso* v. *Pennsylvania Railroad Company* (C.C.A. 3rd Cir.), 219 F. 2d 303, the Court held:

> "One who has procured his employment by fraud may not recover (under Federal Employers' Liability Act) providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Southern Pacific Co.* v. *Libbey* (C.C.A. 9th Cir.), 199 F. 2d 341, the Court said, page 348:

> "It is not questioned by either side that one who procures his employment by fraud is not entitled to the benefits of the Employers Liability Act * * * providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Eresafe* v. *New York N. H. & H. R. Co.* (C.C.A. 2d Cir.), 250 F. 2d 619, the Court said, page 622:

> "A humane and realistic policy in such cases requires substantial proof of a direct causal connection between the misrepresentations made at the time of hiring and the subsequent *injury* to the employee, before any defense of fraud can be considered as a bar to a recovery."

In the case of *Talarowski* v. *Pennsylvania R. Co.* (D.C. Del.), 135 F. Supp., 503, the Court held that an employee is not entitled to maintain an action under the Federal Employers' Liability Act where his employment has been procured by fraudulent statements made in the application for employment, if the statements are relied upon, and are of such a character as to have been a substantial factor in the hiring.

In the case of *Matthews* v. *Atcheson T. & S. F. R. Co.* (Cal.), 129 P. 2d 435, the Court said, page 440:

> "The concealment does not vitiate the contract of employment and prevent recovery, unless there is shown to be a causal connection between the *injury* (not accident) and the misrepresentations in the application for employment."

To the same effect, see *White* v. *Thompson* (Kan.), 312 P. 2d 612.

The Petition for Certiorari, pages 14-15, takes the position that before respondent can avoid liability for petitioner's alleged injuries, on the ground of false representations, that it must be shown that there was a direct causal connection between the false representations and the alleged *accident*. We do not so understand the law. Certainly none of the above mentioned cases so hold. It would be most illogical to hold that respondent could not defend on the ground of such false representations, without showing a direct causal connection between the false representations and the *accident*, when it clearly appears that there was a direct causal connection between such false representations and the *injuries* alleged to have been sustained.

In determining whether this case should have been submitted to the jury, the test seems to be whether, the jury could "with reason" have found the issues in favor of petitioner. *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 1 L. Ed. 2d 493.

> "Where the evidence is so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

Gunning v. *Cooley*, 281 U.S. 90, 74 L. Ed. 720.

> "As to the second category, although the statements concerning directed verdicts are often extremely ambiguous, a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, points so strongly

in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion."

Moore's Federal Practice, Volume 5, page 2314.

We respectfully submit that the facts herein, and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of respondent, that reasonable men could not possibly come to contrary conclusions, and that, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

[redacted]

No. [redacted] 48

MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 713

CARL STILL,

Petitioner,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

The Brotherhood of Railroad Trainmen hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

NATURE OF THE APPLICANT'S INTEREST.

The interest of the Brotherhood of Railroad Trainmen in this case arises from the fact that it is the certified collective bargaining agent for the greater number of operating employees on the American railroads. As such agent, it is the duty and obligation of the Brotherhood to handle all claims for reinstatement made by its members discharged for allegedly executing a false and fraudulent application for employment. The Brotherhood has negotiated a standard provision in its collective bargaining contracts which provides that the railroad must reject the application for employment within a specified period or the applicant will be considered accepted. In the instant case, the Brotherhood is the collective bargaining agent for the petitioner and all other members of his craft and class on respondent railroad. The Brotherhood's contract requires the respondent railroad to reject any application for employment within thirty days. The petitioner, however, was not discharged within the thirty day period but, instead, respondent relied on the alleged misrepresentation at the trial of his suit brought under the Federal Employers' Liability Act, 45 U.S.C. § *et seq.* The trial court held, despite the collective bargaining contract, that petitioner, because of his alleged misrepresentations, was not an employee of respondent and, therefore, could not bring an action under the Federal Employers' Liability Act. The applicant's interest in the directed verdict entered by the trial judge requires reversal of that ruling for two reasons: 1) The Brotherhood has a legitimate interest in seeing that its members are given the opportunity to present their claims under the F. E. L. A. to a jury for its decision. 2) The Brotherhood has an interest in seeing that its collective bargaining contracts are uni-

formly and correctly interpreted so that those contracts cannot be nullified or abrogated by any court in any proceeding whatsoever.

The interest of the Brotherhood in this case will postdate any opinion by this Court. This is so because the decision will be cited to, and construed by, the referees appointed to break the customary deadlocks before the First Division of the National Railroad Adjustment Board, 45 U. S. C. §153. Those referees are still deciding reinstatement cases on the basis of various interpretations made of, and various distinctions which they draw from, the cases of *Minneapolis, St. Paul & S. Ste. M. R. Co.* v. *Rock*, 279 U. S. 410 (1929) and *Minneapolis, St. Paul & S. Ste. M. R. Co.* v. *Borum*, 286 U. S. 447 (1932), cf. Award 19557, Vol. 74, First Division Awards, NRAB (Holding that *Borum* does not overrule *Rock* but merely requires that the misrepresentation be a material one) with Award 16747, Vol. 119, First Division Awards, NRAB (Holding that court decisions establish that certain wilful and material falsifications nullified the time limitation provided in the applicable rule and stating that the *Rock* case supports the decision denying reinstatement).

Applicant finally states that it is interested in this case because the great majority of the discharges for alleged fraud in the application of employment occur after the employee has asserted his rights under the Federal Employers' Liability Act. In such circumstances, the Applicant suggests that this Court should consider the question as to whether the railroads are violating Section 5 of the Federal Employers' Liability Act, 45 U. S. C. 55, by creating a device which discourages the assertion of the rights of injured employees because of a fear of being discharged.

This Court may well be the only court that can effectively enforce the provisions of 45 U. S. C. §55 because of the

holding in *Union Pacific R. Co. v. Price*, 360 U. S. 601, that an Adjustment Board Award denying reinstatement does not constitute a "money award" under the Railway Labor Act and that such an award is final and binding on the discharged employee.

FACTS AND QUESTIONS OF LAW WHICH MAY NOT BE ADEQUATELY PRESENTED BY THE PARTIES.

In the instant case, the petitioner argued in the trial court, where the only hearing in this case was had, that he was entitled to go to the jury and to establish that there was no misrepresentation and even if there were, any alleged misrepresentation had no causal relationship with the petitioner's accident. Since it is likely that petitioner may pursue the same course in this Court, it is believed that the brief, which *amicus curiae* is requesting permission to file, will contain a more complete argument on those issues arising from the trial court's nullification and disregard of the time limitation, within which the respondent must accept or reject the application for employment, imposed by the collective bargaining contract. If applicant's argument is accepted, it would be dispositive of this case.

Respectfully submitted,

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Chicago 2, Illinois.

CERTIFICATE OF SERVICE

I, John J. Naughton, attorney for the Brotherhood of Railroad Trainmen, movent, do hereby certify that on the 6th day of September 1961, I served the attached Motion of the Brotherhood of Railroad Trainmen for Leave to File a Brief as *Amicus Curiae* upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Mr. Walter W. Burton, Law Building, Princeton, W. Va., and to Sachs and Jenkins, Woodward Building, Washington 5, D. C., attorneys for Petitioner; and to Mr. Joseph M. Sanders, Law and Commerce Building, Bluefield, W. Va., attorney for Respondent.

JOHN J NAUGHTON

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 18

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 48

CARL STILL,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR PETITIONER

Opinions Below

The judgment of the Circuit Court of Mercer County, West Virginia is unreported. It is printed at pages 19 and 465 of the Transcript of Record. A petition for Writ of Error and Supersedeas was filed in the Supreme Court of Appeals of West Virginia but denied by that court without opinion. The Clerk's memorandum of the court's judgment is printed at page 510 of the Transcript of Record.

Jurisdiction

The judgment of the Supreme Court of Appeals of West Virginia was entered September 12, 1960 (R. 510). By Order dated December 1, 1960, the time for filing petition for writ of certiorari was extended by the Chief Justice to and including February 10, 1961 (R. 511). The Petition for a Writ of Certiorari was filed February 10, 1961, and was granted April 17, 1961 (R. 512). Petitioner's Motion for Leave to Proceed in Forma Pauperis was granted June 19, 1961 (R. 512).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1959).

Statutes Involved

45 U.S.C. §51 (1959) (Federal Employers' Liability Act):

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none,

then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C. §55 (1959):

"Contract, rule, regulation, or device exempting from liability; set off.

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Questions Presented

1. In a Federal Employers' Liability Act case, did the trial court err in directing a verdict for the respondent railroad on the ground that the petitioner employee, because of alleged misrepresentations relating to his health and physical condition, made when he applied for employment, failed to achieve the status of an employee where:

(a) The evidence corroborated petitioner's testimony that he had not intended to mislead or misrepresent anything to respondent, and the evidence supported the conclusion that he had not misled or misrepresented.

(b) Petitioner worked satisfactorily for respondent for more than 5 years prior to the accident;

(c) The alleged misrepresentations were made more than 6 years prior to the accident, during which period respondent had fired and rehired petitioner after more than a year's absence;

(d) The principal alleged misrepresentation related to a pre-existing physical condition which was plainly visible when petitioner was examined and approved by respondent's examining physician who by his own admission was overworked at the time of the examination;

(e) Except for such physical examination, respondent made no investigation of petitioner's application, even though the most cursory investigation would have disclosed the condition now claimed to have been concealed; and

(f) Considerations of public policy militate in favor of recovery by the petitioner and against absolving respondent of responsibility for its negligence.

2. Assuming an employee obtains a job with a railroad by fraudulently concealing an abnormality in his back, but

is physically examined by the carrier and does nothing to limit or interfere with such examination and investigation as the carrier chooses to make, performs his duties satisfactorily for a number of years, and is thereafter injured as the result of the carrier's negligence, is he an employee entitled to the protection of the FELA?

Statement

This is an action for personal injuries brought under the Federal Employers' Liability Act by a brakeman injured in a collision between a train and a railroad car on which he was riding (R. 1). At the conclusion of the evidence the trial court directed a verdict for respondent, on the ground that petitioner's employment contract was void because procured by fraud (R. 473).

Petitioner was permanently injured on January 23, 1958, in an accident which occurred shortly after midnight, in respondent's yard at Bluefield, West Virginia, in the course of a switching operation. Cars were being detached from a train of approximately 69 cars, which was being pushed on a "lead track" in a westerly direction by an engine at the east end (R. 84, 134, 148, 346). As the train moved, cars were separated or "cut" from it after it passed the "hump", the highest point in the yard, from which the tracks sloped to the east and west (R. 84, 96, 116, 147); after being uncoupled, the "cut" descended by gravity to its designated side track (R. 149). The cut cars were supposed to roll away from the train (R. 355, 362).

At the time of the accident, petitioner was standing on a small, exposed platform at the rear of a 70-ton coal hopper which had been "cut"; unfit for further service, it was being switched to a shop track for ultimate junking

(R. 67, 106, 132, 153, 161, 354, 365). Petitioner could brake but not accelerate (R. 159).

One group of cars had been cut from the train just ahead of the car petitioner was riding (R. 157, 359). Soon after his car rolled free, but unexpectedly and contrary to the established procedure, it was overtaken and violently recoupled by the train (R. 86, 99, 117, 131, 139, 355, 360). The recoupling, followed by a sudden halt, caused a whiplike, jerking reaction which threw petitioner heavily against his car; almost over into it; his side, from waist to knee, struck a steel rim (R. 85, 87, 92, 98, 117, 132, 163, 271, 273, 366).

The switching operation was directed by a brakeman acting at the time as an extra conductor (R. 354). He called the designated side track to the brakeman as his car or cars rolled by (R. 100, 354), and controlled the movement of the train by throwing signal lights on several boards located throughout the yard (R. 85, 96, 115, 149). The conductor, whose duty was to prevent recoupling (R. 92, 98, 159, 360), realized a collision was impending but did not warn petitioner, though he was able to do so (R. 119, 355-358, 363-368). He testified that he delayed signalling the engineer to stop, since every stop slowed up the switching operation (R. 355, 364). There was evidence too that the engineer was known to be inefficient and that he failed to abide the signal thrown by the conductor (R. 87, 97, 99, 110-112, 122, 158, 162, 197, 268, 350, 370, 453).

Petitioner suffered severe and permanent injury as a result of the accident.

His physical fitness prior to the accident is well demonstrated by his employment record. A Negro, aged 31 at the time of the accident, petitioner was a manual laborer. He did not complete high school (R. 200, 479). He had

his first job, at 18, in the coal mines (R. 202). His next job was making bomb shells (R. 201), and he apparently worked a short time for respondent in 1943 (R. 353). When he was 19 years old, on July 18, 1945, he entered the Army (R. 201). During basic training as a soldier he experienced no difficulty performing his duties (R. 204, 206), although later in the Service he had physical difficulties, as the result of which he was given an Honorable Discharge on January 31, 1946, pursuant to a Certificate of Disability (R. 201, 208; Def. Ex. 3; R. 213, 477; Def. Ex. 12; R. 304, 493). After working thereafter, for about two years, as a janitor (R. 142, 216), he again worked briefly for respondent (R. 353) and then returned to working in the mines, "where the work is about three times as hard as the railroad," dusting the cut, working as a brakeman behind a loading machine, loading coal, laying track and handling timbers weighing 40 to 50 pounds (R. 142-144, 217). On July 24, 1951, he was employed by respondent as a brakeman; in October 1956 he was dismissed for deserting his crew (R. 144, 293) and in November 1957 he was reinstated (R. 144, 145, 294). Petitioner experienced no trouble doing the heavy physical labor which these jobs required (R. 144-146, 165, 220).

From July 1951 to October 1956 and from November 1957 to January 1958, the periods petitioner worked for respondent as a brakeman, he performed his duties in a satisfactory manner and was considered a good and competent brakeman (R. 89, 100, 109, 122, 199, 397). His physical condition was considered good by his fellow employees and also by his superiors (R. 89, 110, 122, 199, 397); he was one of the railroad's strongest and most agile brakemen (R. 110, 194, 196).

The accident brought about a severe and permanent injury to petitioner's spinal column, a marked slipping or

dislocation of his vertebra, with injury to the intervertebral disc (R. 54, 55, 60, 70, 73, 81, 324, 435, 456) and painful nerve damage (R. 56, 73, 76). Petitioner had a back deformity, known as spondylolisthesis,[1] which was of long standing and probably was congenital, and there was some disagreement as to whether the effect of the accident was merely to aggravate a quiescent condition without affecting the bone structure or to cause a complete dislocation of the bones involved (R. 60, 79, 80, 81, 244, 324, 434). But in any event it was clear that petitioner became totally disabled from performing physical labor, the only type of work he knew (R. 57-60, 70, 77, 183, 193, 323, 458; but see 243, 325). The doctors disagreed as to whether an operation might improve his condition (R. 58, 59, 74, 78, 81, 321, 324).

The pain caused petitioner by the accident was vividly described by a number of witnesses. According to the doctors the trauma affected his spinal nervous system. As a result, commencing immediately after the accident, he suffered from severe pain and limitation of motion (R. 57, 98, 101, 104, 119-121, 132, 135, 165-167, 172, 181, 191). He continued in pain at the time of the trial, when he was still required to wear a heavy brace (R. 73, 76, 77, 190, 196, 289) and was unable to remain still for any extended time (R. 143, 155, 194).

Respondent took the position at the trial that since petitioner worked, "in a sense, of course, he was an employee" (R. 46), but because of his fraud no valid agreement ex-

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[1] Spondylolisthesis was defined at the trial as a slipping forward of one vertebra on another. In this case the evidence was that petitioner's fifth lumbar vertebra, the one just above the pelvis, was slipped forward on his sacrum (R. 55, 56, 62, 70, 71, 235, 239, 442).

isted and he could not maintain an action under the FELA[1] (R. 29, 35). At the conclusion of the evidence respondent moved for a directed verdict (R. 462).

Despite petitioner's categorical denial of intent to mislead or misrepresent (R. 460) and evidence corroborating his denial, the trial court accepted respondent's theory and directed a verdict for respondent (R. 19-22, 465-474).

Summary of Argument

Petitioner is a manual laborer. Hired by respondent in 1951 as a brakeman, fired in 1956 for deserting his crew, and rehired in 1957, he was injured in 1958 in an accident caused without negligence on his part. During the periods of his employment his services were satisfactory. As a result of the accident he suffered a permanent disability of his lower back, rendering him unable to perform manual labor.

Respondent claimed petitioner was not an employee because he falsely answered a number of questions when he applied for work in 1951. It claimed essentially that he concealed the fact that he had a congenital defect at the point of his back where he was disabled. The trial court directed a verdict for respondent on this issue. In so doing it deprived petitioner of a goodly portion of the relief which Congress afforded railroad workers under the FELA. *Bailey* v. *Central Vt. Ry.*, 319 U.S. 350, 354.

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[1] This defense was injected for the first time on October 5, 1959, the day the trial commenced, notwithstanding an oral stipulation between the parties on August 10, 1959, and a written stipulation filed on September 10, 1959, that petitioner was an employee (R. 40, 22, 41, 18), and the fact that counsel for respondent had some of the information upon which the plea was based when he made the August 10, 1959, stipulation at pre-trial and had additional information at least a week before the trial (R. 42, 43, 422, 456, 463).

There was evidence that petitioner had trouble with his back prior to 1951, but the proof was persuasive that he did not understand its nature, and thought he had recovered from it. As to each question which respondent claimed petitioner answered fraudulently, there was an explanation, corroborated by other testimony and evidence, reasonably eliminating any inference that he answered falsely or with intent to deceive.

Moreover, the evidence strongly suggested, indeed established, that petitioner's employment in January 1958, the time of the accident, was not in reliance on his 1951 application. He had been fired and rehired in the interim, without reliance on his 1951 statements. Further the conclusion was inescapable that when he was employed in 1951, there was no reliance on the representations respondent claims to have been false. Respondent, despite petitioner's representations, insisted on having him thoroughly examined by its own physician. The doctor, however, failed to discover the obvious abnormality in petitioner's spine, which was visible without X-ray.

Further, though the most cursory investigation by respondent, such as examination of his certificate of discharge from the United States Army or a telephone call to the local VA doctor whom petitioner gave as reference, would have disclosed his condition, no investigation whatever was made. By this inexcusable disregard of its unquestioned duty to exercise care in hiring fit people, *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Rock*, 279 U.S. 410, respondent had imputed to it the knowledge which it would have acquired by such inquiry and therefore cannot be said to have relied on petitioner's representations.

Petitioner therefore urges that the trial court erred by taking these issues from the jury. But even assuming the evidence had been such as to justify a finding that peti-

tioner obtained employment by fraud, he nevertheless was an employee entitled to the protection of the FELA. That he was in fact an employee is not disputed. If he perpetrated a fraud on respondent, it was at most as inducement to the contract, which may have entitled respondent to rescind, but which did not affect his status at the time of the accident. *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922).

To deprive petitioner of the benefits of the FELA, therefore, there must be found to exist some consideration of overriding importance, some factor which reasonably might be said to overcome the purpose of the FELA to protect those who work in a hazardous, public service industry. No such factor appears in this case.

Relying on *Minneapolis* v. *Rock, supra*, respondent argues petitioner's fraud was such a factor. But that case involved a physically unfit employee who fraudulently arranged for someone else to take the required physical examination which he had failed. By avoiding the examination he prevented the railroad from physically examining him and thus from exercising care in hiring fit employees, which it was duty bound to do, and he thereby violated the public policy of the FELA.

Petitioner's fraud, if conceded (and it is not conceded), was not of this nature. It is undisputed that he submitted himself to physical examination and to such investigation as respondent desired to make. Moreover, he worked satisfactorily for more than 5 years prior to the accident and his condition, allegedly concealed, in no way contributed to the accident. It cannot be said any consideration of public policy would justify a limitation of the protection to which he was entitled as an employee.

On the contrary, to deprive petitioner of his rights under the FELA would run contrary to the purpose of the Act

to promote safety by stimulating carriers to exercise care in hiring fit workers. *Minneapolis* v. *Rock, supra.* In this case respondent's negligence caused petitioner's injury. To absolve respondent of responsibility when it had full opportunity to examine and investigate petitioner and to learn of the condition of which it now complains would give respondent a windfall it does not deserve and would in fact encourage lax hiring procedures in the industry.

For these reasons petitioner maintains this case should be reversed and remanded for a new trial, with instructions to the trial court to entertain favorably a motion by petitioner to strike the defense of fraud heretofore interposed by respondent.

ARGUMENT

I

The Trial Court Disregarded the Evidence in Directing a Verdict for Respondent.

A. Whether petitioner misrepresented as to material facts with knowledge of their falsity and with intent to deceive were questions for the jury.

Petitioner was deprived of his right to trial by jury, guaranteed by the FELA, when the trial court purported to resolve factual issues against him by directing a verdict for respondent. In its consideration of the Motion for Directed Verdict, the trial court was bound, after considering the evidence in the light most favorable to petitioner, *Gunning* v. *Cooley*, 281 U.S. 90, to determine whether or not, with reason, a conclusion favorable to petitioner might be drawn on the factual issues. Only if reasonable men could not reach differing conclusions on an issue may it be taken

from the jury.[3] Moreover, the court's action is to be reviewed in light of the admonition that the right to trial by jury "is part and parcel of the remedy afforded railroad workers under the Employers Liability Act," and to deprive "these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Central Vt. Ry.*, 319 U.S. 350, 354.

These principles apply not only to questions of negligence and causation but to all factual issues, *Tennant* v. *Peoria & P. U. Ry.*, 321 U.S. 29, 35, including fraud in procurement of a release from an employee, *Dice* v. *Akron, C. & Y. R.R.*, 342 U.S. 359, 363, and whether an injured worker was an employee of a railroad or of a company which contracted to do certain work on its roadbed, *Baker* v. *Texas & Pac. Ry.*, 359 U.S. 227, 228, and including too, therefore, the issues involved in respondent's claim of fraud.

Fraud is never presumed, and where it is alleged the facts sustaining it must be clearly made out. *Farrar* v.

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[3] *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325; *Davis* v. *Virginian R.R.*, 361 U.S. 354, 356; *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107, 110; *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138, 140; *Baker* v. *Texas & Pac. Ry.*, 359 U.S. 227, 228; *Moore* v. *Terminal R.R. Ass'n*, 358 U.S. 31; *Butler* v. *Whiteman*, 356 U.S. 271; *Ferguson* v. *St. Louis-S. F. Ry.*, 356 U.S. 41; *Honeycutt* v. *Wabash Ry.*, 355 U.S. 424; *Stinson* v. *Atlantic Coast Line R.R.*, 355 U.S. 62; *Gibson* v. *Thompson*, 355 U.S. 18; *McBride* v. *Toledo Terminal R.R.*, 354 U.S. 517; *Ringhiser* v. *Chesapeake & O. Ry.*, 354 U.S. 901; *Deen* v. *Gulf, C. & S. F. Ry.*, 353 U.S. 925; *Thomson* v. *Texas & Pac. Ry.*, 353 U.S. 926; *Arnold* v. *Panhandle & S. F. Ry.*, 353 U.S. 360; *Webb* v. *Illinois Cent. R.R.*, 352 U.S. 512, 516; *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 523; *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506; *Wilkerson* v. *McCarthy*, 336 U.S. 53; *Ellis* v. *Union Pac. R.R.*, 329 U.S. 649; *Lavender* v. *Kurn*, 327 U.S. 645; *Tennant* v. *Peoria & P. U. Ry.*, 321 U.S. 29; DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law and Contemp. Prob. 257, 260 (1953); Note, 69 Harv. L. Rev. 1441, 1447 (1956).

Churchill, 135 U.S. 609, 615. To support its claim respondent had the burden of showing by clear and decisive proof that petitioner had made a false representation with intent to deceive; that the representation was not actually believed by petitioner, on reasonable grounds, to be true; that it was acted on by respondent to his damage, and that in so acting respondent was ignorant of its falsity, and reasonably believed it to be true. *Southern Dev. Co.* v. *Silva*, 125 U.S. 247; Prosser, Torts §86 at 523 and 527 (2d ed. 1955). Each of these elements involved factual determinations, peculiarly within the province of the jury. *Sonnentheil* v. *Moerlein Brewing Co.*, 172 U.S. 401, 410.

Petitioner categorically denied any intention to mislead or misrepresent (R. 460) and, as we will demonstrate, his testimony and other evidence at the trial substantially corroborated his denial.

The record established without contradiction, and respondent conceded, that petitioner was in fact an employee. He worked as a brakeman for respondent from 1957 to 1958, having previously worked in the same capacity from 1951 to 1956. He performed all the duties of such an employee, ran all the risks, received all the benefits, and was in every way indistinguishable from other employees.

Yet the trial court ruled that he was not an employee (R. 473). This anomaly it justified by finding that petitioner knew he had spondylolisthesis because he had been hospitalized in the Army and in January, 1946, was discharged on account of it, and had applied for VA benefits. By reasoning which it did not explain the court then stated it thought petitioner had a duty to reveal the condition, and if it had been known respondent would not have hired him. Although it did not so state, the court apparently

rejected all petitioner's testimony because it thought petitioner "lied completely all through this case" [4] (R. 472).

Respondent's essential claim is that petitioner misrepresented his back condition. It points to a number of questions which it says were falsely answered by petitioner in order to conceal this condition (R. 29-35). Some of these questions were in petitioner's application for employment[5] (Def. Ex. 4; R. 225, 480). Others were claimed to have been orally answered by him on questioning by respon-

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[4] If, as its language suggests, the court rejected all petitioner's testimony because it thought he lied, this was a flagrant disregard of the requirement that notwithstanding contradictions or inconsistencies in the testimony of a witness, its weight and credibility are for the jury. *Shelton* v. *United States*, 169 F.2d 665, 667 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 834; *Norfolk & W. Ry.* v. *McKenzie*, 116 F.2d 632, 635 (6th Cir. 1941); *Matthews* v. *Atchison, T. & S. F. Ry.*, 54 Cal. App.2d 549, 555, 129 P.2d 435, 440 (Super. Ct. 1942); *Clark* v. *Union Pac. R.R.*, 70 Ida. 70, 211 P.2d 402 (1949).

[5] The questions and answers in the application for employment were as follows (R. 480):

"10. Give record of all previous employment in date order (include service with this Company, if any)

Name of Employer	Town or City, and State Where Employed	Occupation	FROM Mo. Yr.	TO Mo. Yr.	Reason for Leaving
Peerless Coal Co.	*Vivian, W. Va.*	*Miner, Brakeman*	*11 1948*	*7 1951*	*To get job with Railroad*

11. Give Military service and state whether honorably or dishonorably discharged or given a medical discharge. *U. S. Army. honorable discharged* [sic].

• • •

14. Have you ever been injured? If so when and at what place? *No*
How did it occur?
Extent of injuries?

• • •

17. What is the general condition of your health at present? *Good*"

dent's examining physician who testified he made notations of petitioner's answers* (Def. Ex. 5; R. 249, 483).

In answer to Question No. 10 on petitioner's 1951 application, relating to previous employment, including service with respondent, he listed Peerless Coal Co., from November, 1948 to July, 1951 and stated that he left "to get job with Railroad".

At the trial petitioner testified that in addition to Peerless Coal Co., he had previously worked for a number of companies, some of which he recalled and some of which he could not (R. 202, 217-220). He explained that in the application he listed only Peerless Coal Co. as previous employment because "your previous employment, the way I understand it, is the job you had before you came there" (R. 226, 227), and asked his cross-examiner, "you mean I should put down when I used to deliver papers and everything?" (R. 227).

The record also disclosed that when petitioner applied for employment with respondent in 1948, he listed U.S. Coal and Coke, and Vera Pocahontas as prior employers

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* The questions and answers claimed to have been given orally were as follows (R. 483):

"Have you ever had:

• • •

Rheumatism *No*

• • •

A medical discharge from the military service? *No (Honorable)*

Have you ever had a long or serious illness? *No*

What injuries have you ever received? *No*

Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? *No*

If former employee, when employed? *No previous employment*

Have you ever been previously examined for employment, if so, when, where, and by whom was examination made?

If rejected, state cause of rejection. *None*"

(R. 487). Since respondent did not produce petitioner's 1943 application, the information he furnished at that time was not revealed.

As to his service with respondent, also referred to by Question No. 10, petitioner in his answer to Question No. 13, implied he had previously worked for respondent.[7] At the trial he remembered having been accepted for employment by respondent on an occasion prior to 1951, but did not remember when (R. 221, 222, 250, 255, 256, 264); he said he did not accept the job, which was as a laborer, because he wanted to be a brakeman (R. 256, 264, 265). Respondent introduced evidence that petitioner had applied for employment and had been physically examined and accepted in 1943 (Def. Ex. 8; R. 257, 491) and also in 1948 (Def. Ex. 6; R. 251, 486; Def. Ex. 7; R. 255, 488) and that on each occasion he had been given credit for a few hours on the job, entitling him on one occasion to $8.80 and on the other to $2.97 (R. 352, 353).

To Question No. 11 asking whether he had been honorably or dishonorably discharged or given a medical discharge from the Service, petitioner answered "honorable discharged" [sic]. Even though petitioner's certificate of "Honorable Discharge" was in evidence (Def. Ex. 3; R. 213, 477), respondent claims petitioner's statement that he had an honorable discharge from Military Service was false. To support this claim it points to the statement on the back of the Honorable Discharge certificate (R. 479), effective January 31, 1946, that the "Reason And Authority For Separation" was a Certificate of Disability for Dis-

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[7] "13. In connection with any previous application for employment were you subjected to a physical examination? Yes
If so, when, where, and by whom was examination made?
If rejected, state cause of rejection:
Dr. Murray Excepted" [sic]

charge; this Certificate stated that petitioner had spondylolisthesis, manifested by chronic pain in lower back (Def. Ex. 12; R. 304, 493).

In answer to Question No. 14, relating to injuries, petitioner stated he had never been injured (R. 481). At the trial he testified that he had no personal recollection but had been told by his mother that he had been in a childhood automobile accident (R. 209, 228, 253, 260). He understood that in the accident he hurt his side and believed he broke his ribs (R. 141, 142, 209), but that he "wasn't hurting" at the time he applied in 1951 (R. 228).

According to the Army and VA records petitioner stated while in the Army in 1946 and later to the VA that in 1941 he was "in automobile accident, acquired painful back, laid [sic] to sleep in special position on abdomen for 3 mon. because of pain" (Def. Ex. 18; R. 311, 500), and he had "pains in my right side, come from where I have had my ribs broken (last of 1941); has got bad since I have been in the Army" (Def. Ex. 13; R. 261, 305, 306, 495).

There was testimony by a doctor that X-ray of petitioner's ribs revealed no significant changes; that his ribs had nothing to do with petitioner's back condition (R. 75).

By Question No. 17, petitioner was asked: "What is the general condition of your health at present?" He answered "Good" (R. 482).

All the evidence which we outline in this brief, relating to petitioner's health, including his employment record, prior and subsequent to his application, may be said to bear upon petitioner's statement that his health was good in July, 1951.

Aside from the answers furnished by petitioner in his application, respondent claimed that he gave false information to its examining doctor. Petitioner denied that re-

spondent's physician asked him the questions and that he gave the answers recorded by the physician (R. 247-249). He stated that the physician examined and spoke to five or six other men at the same time (R. 223, 224). He admitted that his signature appeared on the card bearing the doctor's notations but explained that he signed a number of papers (R. 144, 248, 249) and said "they give us a bunch of papers to sign and tell us to go down and mark up for work" (R. 247).

In contrast, respondent's physician stated he had no personal recollection of petitioner or of examining him in 1951; he relied solely on his records (R. 408, 411). Explaining an admitted error in the date of the document on which he noted petitioner's alleged answers, he testified that at the time of the examination "I was being crowded; I had more than I could do" (R. 408). There was thus created an issue as to whether petitioner gave the medical examiner the information noted by him.

Even accepting the doctor's testimony, the evidence nevertheless furnished legitimate explanation of petitioner's answers. The information allegedly given by him was that he had never had a medical discharge from the military service, or received injuries, and that he had not previously been employed or examined by respondent.* Respondent also claimed petitioner falsely told the medical examiner that he never had rheumatism, a long or serious illness, or physical defect (R. 29 et seq.).

In his 1948 application for employment, following which he was employed by respondent, petitioner stated he had had rheumatism (R. 489). Moreover, the evidence, which revealed that he was confused as to whether he had rheu-

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* Questions dealing with these items also appeared in petitioner's application for employment and have been discussed.

matic fever of rheumatism, tended to show that he had suffered from such an ailment in 1941 or 1942 (R. 258, 261, 495), which he understood might have settled in his back (R. 262), but that the doctor who treated him "told me that I would probably outgrow it, and when my back quit hurting me, I thought I had outgrown it, and I haven't had any more trouble out of it until I got this lick" (R. 259, 280).

The plausibility of petitioner's testimony that he did not know he had a physical defect (R. 262) was reinforced by that of the doctors who agreed that spondylolisthesis is often congenital, and asymptomatic, and that many persons go through life without knowing they have it (R. 55, 79, 236, 240, 319, 322, 323, 442); that they are able to perform the most strenuous physical labor without limitation (R. 55, 57, 63, 320). Asked if his Certificate of Disability for Discharge from the Army was for spondylolisthesis, petitioner said "I don't know what I got it for. I know I got a C.D.D., a disability discharge, and this 'spondylo' thing, I don't know what you are talking about . . . I can't even say that word" (R. 214, 262).

Other evidence too corroborated petitioner's statement. For example, after his Army discharge, he received, for aggravation of this condition, a small pension (R. 142, 230; Def. Ex. 16; R. 309, 498), which he understood was for his side (R. 216, 228), and which was later terminated as "clearly and unmistakably erroneous" (R. 231; Def. Ex. 17; R. 310, 499); he was officially advised that his condition was "not a disability under the law" (R. 500). When cross-examined as to why his pension was stopped, petitioner answered: "They told me I was well" (R. 231). "I was under the impression I was well. I wasn't hurting" (R. 232, 228).

There was evidence that in 1947 petitioner, because he was having back pain, sought but was refused hospital

treatment from the VA (R. 299, 317). In December, 1950, he again applied to the VA for similar care. At that time the VA caused him to be examined by Dr. Higginbotham, of Bluefield, West Virginia (Def. Ex. 14; R. 308, 497, fol. 1688) (whose name he gave as reference when he applied for work), and though there was a diagnosis that he probably had spondylolisthesis, thereafter he was advised that the medical findings failed to show need for such hospital treatment or domiciliary care (Def. Ex. 15; R. 309, 497).

There was evidence that petitioner was in an Army hospital from January 10, 1946, to January 30, 1946, because he complained of a pain in his side and lower back and right side (R. 208, 211, 214). He stated he had been put in a ward "nothing like a hospital you have here . . . we walked around and shot pool . . . whatever recreation they have on the ward . . . ," (R. 215).

On this record there was no justification for depriving petitioner of his right to have the jury decide whether with intent to deceive respondent he had falsely stated a material fact which he believed to be true. Reasonably the jury may have concluded that petitioner had not made any representation not actually believed by him, on reasonable grounds, to be true; that he answered all questions in good faith and to the best of his belief.*

There can be no doubt of his statement that he had received an honorable discharge. That he understood the

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* In *Moulor* v. *American Life Ins. Co.*, 111 U.S. 335, 346, involving a claim by the beneficiary of a life insurance policy, it appeared that in applying for insurance the insured had not disclosed one or more ailments which he had, but there was a question as to whether he knew he had them. The Court held that not absolute accuracy, but good faith was required in answering the questions, and that whether the insured had knowledge of his condition should have been submitted to the jury as part of the question whether he made "fair and true answers". See also *Ettelson* v. *Metropolitan Life Ins. Co.*, 164 F. 2d 660, 665 (3rd Cir. 1947).

question regarding previous employment to refer only to his last employer was a reasonable explanation and that he intended no deceit was evidenced by his indication that he had been examined previously and by his listing other employers in an earlier application to respondent. His failure to list an injury in a childhood automobile accident, of which he had no independent recollection and from which he had recovered, seems hardly deceitful. There can be no serious complaint of his statement that the condition of his health at present was good; considering how long it had been since he had difficulty with his back, it would appear unreasonable otherwise to characterize the present condition of his health. Satisfactory performance of the duties of a brakeman for so many years following his application additionally confirmed the honesty of this opinion. See *Edwards* v. *United States*, 140 F.2d 526, 531 (6th Cir. 1944). If he did not tell the medical examiner that he had had rheumatism and assuming rheumatism and rheumatic fever are the same, the jury nevertheless may have found no fraudulent intent in this answer, in light of his having reported such a history in his 1948 application and his belief that he had recovered. See *Prudential Ins. Co.* v. *Gourley*, 267 F.2d 156, 158 (5th Cir. 1959); *United States* v. *Kelley*, 136 F.2d 823, 827 (9th Cir. 1943).

Reasonably too the jury may have concluded that no question asked petitioner to disclose his back trouble. Some of respondent's questions were so general as to be misleading, some were ambiguous, and some sought opinions,[10] not facts. No question specifically asked for the information, nor did any question seek the names of doctors who had

[10] Statements of opinion, in general, are not statements of fact, on which a claim of fraud may be premised. *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U.S. 665, 673; *Southern Dev. Co.* v. *Silva*, 125 U.S. 247, 250. In doubtful cases, whether a representation is one of fact or an expression of opinion is a question for the jury. 5 Williston, Contracts §1491 (rev. ed. 1937).

treated petitioner or hospitals in which he had been confined. The question regarding injuries did not call for the information about his back, since the ailment was congenital; the query as to the general condition of his health at present surely did not, since it was not troubling him. If petitioner reasonably was justified in his opinion that he never had a long or serious illness, that question did not call for the disclosure; and if petitioner, as he testified with reasonable support from the VA records,[11] did not know he had a "physical defect," that question did not.

For these reasons we submit the court had no right to rule as matter of law that petitioner made any false representation as to a material fact with knowledge of its falsity and with intent to deceive.

B. It was for the jury to decide whether petitioner's employment was because of respondent's reliance on his representations.

Aside from the issues involving the truthfulness of petitioner's statements and his knowledge and intent, which are discussed in the preceding section, the record presented for the jury a number of questions relating to respondent's conduct.

There was, for example, ample justification in the evidence for a reasonable finding that respondent's employment of petitioner at the time of the accident was not because of any reliance respondent had placed on his 1951 application. On the contrary the weight of the evidence was that the 1951 employment had been terminated in 1956, and

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[11] In support of petitioner's justification for relying on his advice from the VA that his condition was "not a disability under the law" and that medical findings showed no need for hospital or domiciliary case, see *United States* v. *Kelley*, 136 F.2d 823, 827 (9th Cir. 1943).

petitioner had been rehired in 1957, without reference to his 1951 application. Further, there was persuasive proof that respondent had or should have had notice of petitioner's back condition before it hired him in 1951, and that in any event it placed no reliance in 1951 on petitioner's claimed misrepresentations.

As we have stated, it was necessary for respondent, in order to support its defense of fraud, to establish by clear and convincing proof that it relied on petitioner's representations to its damage, and that it reasonably believed his representations to be true, *Southern Dev. Co.* v. *Silva*, 125 U.S. 247, 250, and whether there was such reliance was a question for the jury, *Clark* v. *Union Pac. R.R.*, 70 Ida. 70, 74, 211 P.2d 402, 405 (1949); Prosser, Torts §89 at 551 (2d ed. 1955).

It is well settled moreover that respondent's reliance must have been justifiable. There may be imputed to it "'knowledge of the result, which upon due inquiry, [it] . . . ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.'" *Farrar* v. *Churchill*, 135 U.S. 609, 616. Respondent will not be relieved of the consequences of its own inattention and carelessness; it may not put faith in representations the falsity of which, with reasonable care, it would have discovered; it cannot close its eyes to avoid discovery of the truth. *Andrus* v. *St. Louis Smelting & Refining Co.*, 130 U.S. 643; *Slaughter's Adm'r* v. *Gerson*, 80 U.S. (13 Wall.) 379, 383; *Casso* v. *Pennsylvania R.R.*, 219 F.2d 303 (3rd Cir. 1955); 1 Harper and James, Torts §7.12 (1956).

Where prudence dictates investigation, the complaining victim is required to investigate. *Shappirio* v. *Goldberg*, 192 U.S. 232. *A fortiori* he must do so if he has discovered something which should serve as a warning that he is being deceived. For this reason it is essential to consider

the special knowledge and experience of the one claiming fraud. *Dalhoff Const. Co.* v. *Block*, 157 Fed. 227 (8th Cir. 1907); Prosser, Torts §89 at 552 at n. 8; 1 Harper and James, Torts §7.13 at 584 (1956). And the duty to investigate applicants for employment is greater for interstate carriers than for many other employers, for they "owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service." *Minneapolis, St. P. & Ste. M. Ry.* v. *Rock*, 279 U.S. 410, 413.

On the other hand it is well settled that if one makes an investigation it may be reasonable to infer that he did not rely on the misrepresentations; the fact that he was unwilling to accept the statement without verification evidences that he did not believe it. *Shappirio* v. *Goldberg*, 192 U.S. 232, 241; *Farnsworth* v. *Duffner*, 142 U.S. 43, 47.

The question of reliance and all the related issues suggested by this résumé of elementary legal principles were raised by the evidence in this case, and each was a question for the jury. The trial court gave no consideration to any of these issues.

(1) Petitioner's employment in 1958 was not in reliance on his 1951 application.

Respondent fired petitioner in November, 1956, for deserting his crew and failing properly to perform his duties (R. 436; Pl. Ex. 22; R. 454, 475). In November, 1957, petitioner was reinstated, with his seniority unimpaired, but he was required to sign a waiver of all monetary or other claims, including those for time lost as a result of his discharge, and vacation rights (R. 436 et seq.; Pl. Ex. 21; R. 454, 474; Pl. Ex. 23; R. 455, 476). According to testi-

mony offered by respondent, when petitioner returned to respondent's employment in 1957, he was not physically examined, except as to vision (though there was a requirement that his hearing also be examined) (R. 419-424; Def. Ex. 32, R. 420, 510). And the evidence was that there was no record of any examination of petitioner, except as to vision (R. 437). Petitioner, however, testified he was physically examined (R. 145) and there was testimony by another employee who also had been discharged and later rehired, that the latter underwent a 30 minute physical examination (R. 382, fol. 1105).

From this it appears either that petitioner was examined and the results withheld, which surely would justify an inference that the examination revealed his defect, or that he was not examined, which would have constituted such gross carelessness on respondent's part as to defeat its defense. In either event the jury would have been justified, though the trial court ignored the issue, in finding no connection between the 1957 hiring and the 1951 representation.[13]

(2) Respondent knew or should have known of petitioner's condition.

Moreover respondent knew, or reasonably should have known, petitioner had a back deformity, since respondent did not accept petitioner's representations at face, but rather subjected him to a careful physical examination, which should have disclosed the condition.

Petitioner's spondylolisthesis was marked by an apparent physical abnormality, which he could not conceal. This con-

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[13] Similar situations have been considered in other cases, where it was held that in the second employment there could be no reliance on misrepresentation in obtaining the first employment. *Chiodo* v. *Whitehead & Kales Co.*, 327 Mich. 499, 42 N.W.2d 238 (1950); *Kansas City M. & O. Ry.* v. *Estes*, 203 S.W. 1155, 1160 (Tex. Civ. App. 1918), aff'd 228 S.W. 1087 (1921).

dition had existed for many years (R. 237, 319, 323, 431, 442). It was the kind of a condition often discovered coincidentally in routine examinations (R. 237). According to a doctor who examined petitioner at respondent's request after the accident, the condition was the same at the time of trial as it was "way back in the middle forties" (R. 241, 243). In 1947, a VA examiner had found a "prominent sacrum with a hollow back" (R. 316).

After the accident he was found to have a depression, "a little jog", in his lower back, which was readily seen and felt (R. 75, 235, 236, 431). Also the lower curve in his back was very much more marked than normal (R. 54, 57, 75, 456, 457). To an examining doctor, this indicated spondylolisthesis, even without X-rays (R. 57).

Though these indications of spondylolisthesis existed when petitioner was examined for employment in 1951, respondent's medical examiner did not note them. According to him, the physical qualifications for brakemen were the highest the railroad required and, though "at that time" respondent made no X-rays in pre-employment examination (R. 410), he characterized his examination of petitioner as "thorough" [11] (R. 405, 411, 422). Yet he failed to detect the obvious symptom of petitioner's condition (R. 423). Some light may have been shed on this omission by his testimony that at the time of his examination "I was being crowded; I had more than I could do" (R. 408).

This evidence amply supported the conclusion that respondent did not rely on petitioner's representations, but rather on its own examination, and that by that investiga-

[11] He also characterized his examination as a screening examination (R. 410). There was testimony from petitioner and another examined at the same time that they were stripped (R. 246, 382). The other worker stated he was requested to bend and touch the floor and he believed the doctor felt his back (R. 382).

tion it was charged with knowledge of petitioner's back condition.

The jury would have been reasonable also if it had found that respondent was charged with knowledge of the claimed fraud by petitioner's prior applications for employment, which referred to his having had rheumatism. It may have found that respondent was put on notice too by petitioner's statement, when asked to state the cause of rejection, if rejected in connection with previous applications for employment, that he had been "Excepted". If respondent's testimony is believed, that petitioner's sick record while in the service of respondent was marked by extraordinary absence (R. 375, 506-509), this too was sufficient to put it on notice of defective physical condition.

(3) Respondent did not rely on petitioner's representations when it hired him in 1951.

The record also plainly excluded the notion that respondent hired petitioner in 1951, in reliance on his representations. On this issue the only reasonable conclusion from the evidence was that respondent relied, not on petitioner's representations, but on its observation and examination of petitioner; that its examination was careless; that it shut its eyes in order to avoid discovery of the truth, and became estopped to claim it was misled.

Respondent's application form called for petitioner's age, address, relatives, education, and certain information about his physical history and condition. It also called for references which petitioner furnished. On the reverse side of the form was written: "This man has worked in mines and dropped cars around tipple, also neat and clean in appearance" (R. 483).

Elementary caution dictates some investigation in hiring any employee. Respondent recognized its duty to take care

to exclude the unfit from its service, *Minneapolis* v. *Rock*, 279 U.S. 410, 413, by requiring names of former employers and references, by its insistence on a "thorough" physical examination and by its rule allowing thirty days for investigation.[14] In setting different standards for medical examinations, it recognized too that the need to investigate is especially felt when hiring a brakeman entrusted with the personal safety of *himself* and others and with the handling of expensive equipment in a hazardous industry. Yet apparently it made no investigation, before or after petitioner was hired, even of the questionable items on the face of petitioner's application.[15]

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[14] Article 17(e) of Rates of Pay and Regulations, Norfolk & Western Ry. Co. (Rev. 1943), in force at the time petitioner was hired, specified:

"Applications for employment will be accepted or rejected within thirty (30) days. If not notified within thirty (30) days, applicant will be considered as accepted."

These regulations were not introduced in evidence, but they were the subject of agreement between respondent and the Brotherhood of Railroad Trainmen, and were furnished by respondent to its employees.

In *Minneapolis, St. P. & S. Ste. M. R.R.* v. *Borum*, 286 U.S. 447, 449, the Court held, under an identical rule, that the railroad "did not, without more, have the right to remove plaintiff from its service on account of such misrepresentation [as to age]." See *Carter* v. *Peoria & P. U. Ry.*, 275 Ill. App. 298 (1934); *Blanton* v. *Northern Pac. Ry.*, 215 Minn. 442, 447, 10 N.W.2d 382, 385 (1943).

[15] In his application (R. 480), petitioner stated he had left his prior employment to take a job with a railroad, a job apparently he did not have. If he did have the job before he filed his application, of course, there was no reliance on his application. *Casso* v. *Pennsylvania R.R.*, 219 F.2d 303, 304 (3rd Cir. 1955). If, on the other hand, he left his prior job for a job he did not have, this was plainly a suspicious circumstance calling for investigation.

Petitioner also gave as reference the name of Dr. Higginbotham, a doctor who examined for the VA in Bluefield, West Virginia (R. 482, fol. 1688).

Asked if he had been physically examined in connection with any previous examination for employment and rejected, petitioner said: "Excepted" [sic] (R. 481).

It is difficult to conceive of any justification for respondent's failure to carry out its duty to make an investigation of petitioner's application.[16] If it had, it would have discovered petitioner's condition. In its haste to employ petitioner, respondent hired him on the day he applied in 1951 (R. 373) and failed even to check its own records (where it would have learned of his history of rheumatism and of other places he had worked), or to require petitioner to present his "honorable discharge" (which would have disclosed the Certificate of Disability for Discharge), nor did it phone the local VA doctor given as reference (though use as reference of a doctor who examined for the VA suggested some health problem).

To effectuate its duty to exercise care in hiring, respondent relied solely on the physical examination by its medical examiner. Its insistence on a "thorough" examination was of course a recognition that good sense forbade blind reliance on the application, and reasonably suggested respondent was relying on the examination, not the petitioner's statements. The inadequacy of the examination,[17]

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[16] The necessity of careful investigation of applicants, in addition to physical examination, has been the subject of discussion in the industry for many years. Tate, *The Physical Fitness and Judicious Selection of New Employees*, 32 The Bulletin, The Association of Railway Claim Agents, 291-299 (Jan. 1948); Copp, *How Best to Check Up Applications for Train and Switching Service—What Safeguards Should Be Employed*, Thirty-eighth Annual Meeting of the Association of Railway Claim Agents, 81, 82 (1927). These industry discussions emphasize that prudence dictates careful investigation; that "meticulous inquiry into applicant's references and previous employment history are indispensable requirements." Tate, *The Physical Fitness and Judicious Selection of New Employees*, *supra*, at 291.

[17] That the examination was superficial was suggested by the medical examiner, despite his testimony to the contrary, when he testified he had more than he could do (R. 408).

Regardless of his characterization of the examination, however, the jury may have found any physical examination of a brakeman

however, demonstrated that though respondent had no intention of relying on petitioner's representations, the procedure it set up for investigation was not calculated to disclose obvious defects such as spondylolisthesis. Whether this was deliberate or from lack of care, the plain inference remained that respondent was relying on its investigation, not on petitioner's representations.

Respondent is a well established carrier. At its disposal were extensive resources for physical examination and investigation of applicants' references and prior employers. Considering its special knowledge and experience, it is incongruous indeed to have respondent claim that it was defrauded by petitioner, a laborer who submitted himself to all the examination and investigation requested by respondent, and whose physical defect was apparent on physical examination and repeatedly referred to in official records concerning him.

The only reasonable inference from the evidence was not that respondent was defrauded, but rather that it was careless or calculating. The record compels the conclusion that respondent shirked its duty as an employer, and especially as an employer in the dangerous work of railroading. It therefore was charged with the knowledge that even the slightest inquiry would be uncovered. On the issue of fraud in procuring employment, therefore, not respondent, but petitioner was entitled to a directed verdict.

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to be inadequate without X-rays. This was implied by the doctor's testimony that at the time petitioner was examined in 1951 the railroad did not make X-rays (R. 410); presumably he meant that as of some subsequent date respondent commenced to X-ray applicants. This is a likely inference, since back X-rays in pre-employment examinations have been urged as a necessary precaution and have been required by many carriers. *X-rays of the Spine in Pre-Employment and Periodic Examinations*, Proceedings of the Thirty-seventh Annual Meeting of the Medical and Surgical Section, Association of American Railroads, 45-54, 61, 62 (1957).

II

The Trial Court Erroneously Interpreted the Law in Directing a Verdict for Respondent.

Assuming, but not conceding, that the evidence had been such as to justify a finding that petitioner obtained employment by fraud, petitioner nevertheless was entitled to the protection of the FELA.

Since petitioner admittedly was hired by respondent and for more than five years performed his duties satisfactorily, he surely could not be deprived of the benefits of the law in the absence of some overriding consideration to the contrary. And in appraising his status it is significant that the FELA was enacted primarily for the benefit of railroad workers who found themselves without safeguard in the hazardous industry in which they worked, and that the statute is to be interpreted liberally for the protection of the workers.[18] *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432; Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Prob. 160 (1953). Moreover, "employee" is not

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[18] That Congress intended no technical restriction of its coverage may be indicated by its provision that there shall be liability in damages "to any person suffering injury while he is employed by such carrier"; by its exact words therefore the Act does not, as did its predecessor, 32 Stat. 232, cause the liability to run to any of its employees. 45 U.S.C. §51. This change in language may have manifested a deliberate purpose to cover those working for carriers, whether or not they were employees in a technical sense. See dissenting opinion of Mr. Justice Clarke in *Hull* v. *Philadelphia & R. Ry.*, 252 U.S. 475, 488, in which he said:

> "The Federal Employers' Liability Act does not require that a person shall be in the exclusive employ of a railroad common carrier in order to come within its scope. It provides that such carrier shall be 'liable in damages to any person suffering injury *while he is employed* [*engaged*] *by such carrier in such commerce*'. . . ." [Italics and brackets in original.]

used in the Act in any special sense. General principles apply in determining who is an employee, *Baker* v. *Texas & Pac. Ry.*, 359 U.S. 227, 228; *Hull* v. *Philadelphia & R. Ry.*, 251 U.S. 475, 479; *Robinson* v. *Baltimore & O. R.R.*, 237 U.S. 84, 94.

Respondent argued to the trial court that petitioner was not entitled to recover because his employment contract was void, and he therefore was not an employee. If it be considered, as respondent contends, that petitioner's employment in 1958 was pursuant to his 1951 application, the express terms of that contract plainly signified that his status was voidable, not void. The application form did not provide that misrepresentation would void his status as an employee; it stated that a false statement or misrepresentation would justify dismissal[19] (R. 482), and respondent so construed the contract by its dismissal of petitioner, after a hearing, in December, 1959, "for falsifying application for employment as Yard Brakeman and false statements made in connection with physical examination for employment, July 24, 1951" (R. 39).

This interpretation by respondent accorded with the well recognized principle that fraud in the inducement of a contract renders it voidable, not void. And a voidable contract is operative until rescinded. *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922); *Laughter* v. *Powell*, 219 N.C. 689, 14 S.E.2d 826, 136 A.L.R. 1116 (1941), *cert. denied*, 314 U.S. 666; 5 Williston, Contracts §1488 (rev. ed. 1937). It is only when fraud occurs in the factum, when a contracting party, through fraud, is led to do something other than

[19] At the foot of petitioner's 1951 application, above his signature, appeared the following statement, as part of the printed form (R. 482):

"I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company."

that which he thinks he is doing, that a contract is deemed void from its inception. 3 Pomeroy, Equity Jurisprudence §899 at 543, 544 (5th ed. 1941); 5 Williston, Contracts §1488 at 4154 (rev. ed. 1937); 2 Restatement of Contracts, §475 at 905 (1932).

These principles are exemplified in *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir., 1922), a personal injury action under the FELA, resulting from an employee's fall, in which the court affirmed the exclusion of evidence tendered in support of a defense that the employee had procured employment *inter alia* by concealing a history of epilepsy to which his fall was attributed. The Court recognized the right of the railroad to attribute the plaintiff's fall to prior injury or affliction but held:

> "That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter . . . . We regard the decisions such as Lupher v. Atchison, T. & S. F. Ry. Co., 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N.S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the federal Employers' Liability Law . . . and the fault of the defendant was alleged under the Safety Appliance Acts . . . . And in our opinion we should hold that the defense urged was not available, in view of the positive terms of Sections 1 and 5 of the former act." 283 Fed. at 354.

But respondent contends that *Minneapolis* v. *Rock*, 279 U.S. 410, supports its position. Rock's application for employment was rejected because of his poor physical con-

dition. A few days later he reapplied and, concealing his true identity, was accepted subject to physical examination. He procured a friend to take the physical examination and believing he had examined the petitioner, the examining physician reported favorably on the application. About 15 months later Rock was injured. He brought suit and secured a verdict under the FELA. The judgment was affirmed by a state court, but reversed by this Court.

It has been ably argued that the *Rock* decision confused the consequences of fraud in the inducement and fraud in the factum and otherwise failed to accord with accepted judicial rationale and that it should be reversed.[20] Since it may be reasoned that the railroad had no intention to contract with Rock, but thought it was hiring the man who took

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[20] "Not only, therefore, is the rule adopted in the *Rock Case* out of harmony with the general principles of law governing the master-servant relationship and with the current of prior decisions in similar cases; it is also out of harmony with the accepted judicial rationale of the employer-employee relationship under the Employers' Liability Act and it fails to promote any purposes of expediency which might justify the departure from logical harmony with the course of decision elsewhere . . . [T]he purpose of the Employers' Liability Act was . . . to place upon the industry the duty of caring for the human sacrifices to the demands of the machine age in a manner more satisfactory to modern thought than that provided by the rules of the common law. Employees, injured by the employers' negligence, come under the protection of its terms. *Rock* answers to that description, and it seems a perversion of the purpose of the Act to place him beyond the pale merely because he lied to get his job." Merrill, *Misrepresentation to Secure Employment*, 14 Minn. L. Rev. 646, 656 (1930); see also 43 Harv. L. Rev. 141 (1930); 28 Mich. L. Rev. 357 (1930); 14 Minn. L. Rev. 98 (1930).

As stated in *Boshaw* v. *J. J. Newberry Co.*, 259 Mich. 333, 337, 243 N.W. 46, 47 (1932):

> "While in Federal decisions there seems to be a trend to the contrary (see *Minneapolis, etc., R. Co.* v. *Rock*, 279 U.S. 410 [49 Sup. Ct. 363]), the weight of authority in State courts sustains the right of an employee to compensation notwithstanding he secured the employment through fraud or misrepresentation as to his physical condition, former discharge, age, etc."

the physical examination, it may be said also that in *Rock* there was fraud in the factum, which would have justified a finding that the employment contract was void, rather than voidable. See *Qualls* v. *Atchison, T. & S. F. Ry.*, 112 Cal. App. 7, 17, 296 P. 645, 650 (App. Div. 1931); *Plick* v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 537, 127 So. 59, 66 (1930).

Careful reading of *Rock*, however, establishes that it was not considered in conventional terms of the effect of fraud on a contract. There is no suggestion of an intention to alter the rule of *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922). It did not determine that Rock was not an employee; it held that he was not of right an employee within the meaning, or entitled to the protection, of the FELA. Rock was not deprived of the benefits of the FELA merely because he concealed his physical condition. As the Court explained in *Minneapolis, St. P. & S. Ste. M. R.R. Co.* v. *Borum*, 286 U.S. 447, 449, Rock was foreclosed because he obtained employment "by fraudulently evading the company's rule requiring applicants to submit to a physical examination. . . ." This evasion was found to be irreconcilable with the carrier's duty to patrons and employees to take care to employ only competent workers, and consequently with public policy. In other words, if the railroad could not examine Rock, it could not use the care the law required of it. The Court held:

> "The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of

its duties and to defeat important purposes sought to be advanced by the Act. 279 U.S. at 414.

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"Right to recover may not justify [sic] or reasonably be rested on a foundation so abhorrent to public policy." 279 U.S. at 415.

The essence of the holding therefore was that an employee may not recover under the FELA if his employment is found to be against the public policy inherent in that Act. *Plick* v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 537, 127 So. 59, 66 (1930); *Ganga* v. *Ford Motor Co.*, 250 Mich. 247, 249, 230 N.W. 159 (1930); *Texas & N. O. R.R.* v. *Webster*, 123 Tex. 197, 70 S.W.2d 394 (1934), *cert. denied*, 293 U.S. 580; *Fort Worth & D.C. Ry.* v. *Griffith*, 27 S.W. 2d 351, 353 (Tex. Civ. App. 1930). So interpreted *Rock* states a well established principle. *Ritter* v. *Mutual Life Ins. Co.*, 169 U.S. 139, 154; *United States Bank* v. *Owens*, 27 U.S. (2 Pet.) 527, 538.[21]

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[21] Soon after *Rock* this Court decided *Minneapolis, St. P. & S. Ste. M. R.R.* v. *Borum*, 286 U.S. 447, a personal injury action under the FELA, defended on the ground that the worker falsely understated his age. *Borum*, as we have noted, paraphrased *Rock* as holding that one who obtained employment by fraudulently evading the company's rule requiring applicants to submit to a physical examination could not maintain an action for injury under the FELA. The Court noted Borum's physical fitness, his 7 years of satisfactory service and the fact that neither his age nor his physical condition contributed to cause his injury. It deprecated the materiality of his misrepresentation and the railroad's reliance upon it and was influenced by the point that under its 30-day rule the railroad could not, without more, remove petitioner from its service for misrepresentation. In the same vein, it pointed out that his physical condition was not shown to be such as to make his employment inconsistent with the carrier's discharge of its duty to select fit employees. On this basis it found the case not within the rule of *Rock*. It is apparent therefore that in *Borum* there was no purpose to extend the rule of *Rock*.

This reasoning does not deprive petitioner of his right to the protection of the FELA. On the contrary it requires that he be given that protection. If the facts be assumed against him, he concealed a physical defect, but he did not "set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce." 279 U.S. at 414. He did not make it impossible for the carrier to examine him and to carry out its duty to exercise care in hiring. On the contrary he submitted himself to such physical examination as respondent chose to give and afforded it full opportunity to exercise all the care it chose to exercise in selecting him. And, as we have established, even the most cursory investigation would have uncovered what is now claimed to have been a fraud.

To deprive petitioner of the protection of the FELA would not, in the language of *Rock*, stimulate carriers to proper performance of their duty to exercise care in hiring. Such an extension of the rule would negate the very philosophy which *Rock* protects. It would put a premium on laxity. It would encourage a carrier to minimize its care in hiring, secure in the hope that, if an injury occurred, it might discover some misrepresentation, and in the knowledge that such evidence would preclude relief. The purpose of the FELA requires that petitioner not be deprived of the protection of that Act.

Since *Rock* was decided it has been discussed in a number of cases dealing with fraud in procuring employment as a defense to personal injury proceedings by employees.[22] In

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[22] In a number of these cases the only claimed misrepresentation related to the age of the employee, which was understated in *Boshaw* v. *J. J. Newberry Co.*, 259 Mich. 333, 243 N.W. 46 (1932); *Ganga* v. *Ford Motor Co.*, 250 Mich. 247, 230 N.W. 159 (1930); *Laughter* v. *Powell*, 219 N.C. 689, 14 S.E.2d 826, 136 A.L.R. 1116 (1941), *cert. denied*, 314 U.S. 666, and overstated in *Long* v. *Big Horn Construction Co.*, 75 Wyo. 276, 295 P.2d 750 (1956); *New-*

general they have followed the traditional reasoning that misrepresentation in procuring employment may give rise to a right of rescission by the employer, but does not void his status.[23] In some the misrepresentation has been found

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kirk v. *Los Angeles Junction Ry.*, 21 Cal.2d 308 at 320, 131 P.2d 535 at 543 (1942); *Matthews* v. *Atchison, T. & S. F. Ry.*, 54 Cal. App.2d 549, 129 P.2d 435 (Super. Ct. 1942); *Powers* v. *Michigan Cent. R.R.*, 268 Ill. App. 493 (1932); *Plick* v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 127 So. 59 (1930). In some, other information has been involved, such as name or identity: *Eresafe* v. *New York, N. H. & H. R.R.*, 250 F.2d 619 (2nd Cir. 1957); *Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co.*, 14 Cal. App.2d 454, 58 P.2d 688 (App. Div. 1936); *Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra;* prior employment, discharge by prior employer, references, and claims against prior employers: *Eresafe* v. *New York, N. H. & H. R.R., supra; Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co., supra; Qualls* v. *Atchison, T. & S. F. Ry.*, 112 Cal. App. 7, 16-18, 296 P. 645 (App. Div. 1931); *Powers* v. *Michigan Cent. R.R., supra; Dawson* v. *Texas & Pac. Ry. Co.*, 123 Tex. 191, 70 S.W.2d 392 (1934); *cert. denied*, 293 U.S. 580 (1934); *Texas & N. O. R.R.* v. *Webster*, 123 Tex. 197, 70 S.W.2d 394 (1934), *cert. denied*, 293 U.S. 580; *Fort Worth & D. C. Ry.* v. *Griffith*, 27 S.W.2d 351 (Tex. Civ. App. 1930). A number have involved claims of misrepresentation of physical condition, either solely or along with other facts: *Eresafe* v. *New York, N. H. & H. R.R., supra; Casso* v. *Pennsylvania R.R.*, 219 F. 2d 303 (3rd Cir. 1955); *Talarowski* v. *Pennsylvania R.R.*, 135 F. Supp. 503 (D. Dela. 1955); *Carter* v. *Peoria & P. U. Ry.*, 275 Ill. App. 298 (1934); *Clark* v. *Union Pac. R.R.*, 70 Ida. 70, 211 P.2d 402 (1949); *White* v. *Thompson*, 181 Kan. 485, 312 P.2d 612 (1957); *Powers* v. *Michigan Cent. R.R., supra; Blanton* v. *Northern Pac. Ry.*, 215 Minn. 442, 10 N.W.2d 382 (1943); *Dawson* v. *Texas & Pac. Ry., supra; Fort Worth & D. C. Ry.* v. *Griffith, supra.*

It is interesting to note that in all but three of these cases, the decision has been favorable to the employee: *Talarowski* v. *Pennsylvania R.R., supra*, in which a pretrial motion to strike the defense of fraud was denied, because it involved jury questions; *Clark* v. *Union Pac. R.R., supra*, in which the issue of reliance was held to be a jury question; and *Fort Worth and D. C. Ry. Co.* v. *Griffith, supra*, in which the court's logic plainly was imperfect.

[23] *Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co., supra; Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Blanton* v. *Northern Pac. Ry., supra, Laughter* v. *Powell, supra;*

immaterial.[24] In some it was recognized that the defense was without merit if the employer knew or should have known the true facts.[25] Others have recognized that *Rock* was based on the strong public policy that care be exercised in hiring fit employees.[26]

Where physical condition has been an issue, emphasis has been placed upon the actual physical fitness of the employee; in this connection the courts have often adverted, as evidence of fitness, to the number of years of satisfactory work performed by the employee, and to the fact that the worker was physically examined and passed.[27] On this point Rock's case has been distinguished on the ground that he was not physically examined.[28] Basically the cases reflect a refusal to take from the bona fide worker the benefits of the FELA, and an unwillingness to relieve the railroads of responsibility for their negligence.[29]

Dawson v. *Texas & Pac. Ry. Co., supra; Texas & N. O. R.R.* v. *Webster, supra; Long* v. *Big Horn Construction Co., supra;* Annot. *Misrepresentations in Seeking Employment,* 116 A.L.R. 1116 (1942).

[24] *Powers* v. *Michigan Cent. R.R., supra; Qualls* v. *Atchison, T. & S. F. Ry., supra.*

[25] *Eresafe* v. *New York, N. H. & H. R.R., supra; Casso* v. *Pennsylvania R.R., supra; Phillips* v. *Southern Pac. Co., supra; Carter* v. *Peoria & P. U. Ry., supra; White* v. *Thompson, supra; Ganga* v. *Ford Motor Co., supra; Blanton* v. *Northern Pac. Ry., supra.*

[26] *White* v. *Thompson, supra; Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra; Texas & N. O. R.R.* v. *Webster, supra; Fort Worth & D. C. Ry.* v. *Griffith, supra.*

[27] *Newkirk* v. *Los Angeles Junction Ry., supra; Matthews* v. *Atchison, T. & S. F. Ry., supra; Carter* v. *Peoria & P. U. Ry., supra; White* v. *Thompson, supra; Blanton* v. *Northern Pac. Ry., supra; Laughter* v. *Powell, supra; Texas & N. O. R.R.* v. *Webster, supra; Long* v. *Big Horn Construction Co., supra.*

[28] *Eresafe* v. *New York, N. H. & H. R.R., supra; Qualls* v. *Atchison, T. & S. F. Ry., supra; Carter* v. *Peoria & P. U. Ry., supra; Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra.*

[29] See especially *Phillips* v. *Southern Pac. Co., supra.*

Many courts have sought to derive from *Rock* and *Borum* a criterion to apply to the defense of fraud in procuring employment, though no court has found the facts before it within the rule it stated. Taking phrases from *Rock* and *Borum* out of context, some have phrased the test in terms of false representation of such character that it substantially affected the examining surgeon's conclusion that the employee was in good health and acceptable physical condition,[30] or of such character as to have been a substantial factor in the hiring.[31] As an element of the defense a number of courts have imposed a requirement that the employee be in fact physically unfit for employment and that such unfitness be a cause of the accident.[32] Some have said the contract will be void and recovery precluded only if there is a causal connection between the accident and the misstatements.[33] One opinion interpreted *Rock* to mean no recovery may be permitted because the contract is void if there is positive and affirmative fraud, even though unrelated to physical condition.[34]

These courts have missed the basic point that Rock was precluded because he set at naught the carrier's reasonable rules and practice established to promote safety; he prevented the railroad from exercising care in hiring. The materiality of his misrepresentations and the railroad's reliance upon them were of no necessary consequence in *Rock*.

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[30] *Casso* v. *Pennsylvania R.R., supra; Southern Pac. Co.* v. *Libbey*, 199 F. 2d 341 (9th Cir. 1952).

[31] *Talarowski* v. *Pennsylvania R.R., supra.*

[32] *Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra; Blanton* v. *Northern Pac. Ry., supra.*

[33] *Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co., supra; Clark* v. *Union Pac. R.R., supra; Long* v. *Big Horn Construction Co., supra.*

[34] *Fort Worth & D. C. Ry.* v. *Griffith, supra.*

The controlling feature, as we have emphasized, was that his fraud prevented the railroad from performing its duty to its other employees and to the public. His fraud in reality resulted in a contract which was contrary to a strong public policy.

In this connection respondent makes much of the fact that petitioner's injuries were sustained at the part of his body where his defect existed. To bolster this argument it points to cases stating there can be no recovery if there is a causal connection between the misstatement and the injury. These opinions, however, refer to the happening of the accident, not the existence of the injury. In *Matthews* v. *Atchison, T. & S. F. Ry.*, 54 Cal. App. 2d 549, 129 P. 2d 435 (Super. Ct. 1942), where the employee understated his age and there was evidence that the effect of his injury was more serious because of his age than if he were younger, the court specifically held that the requirement of causal connection related to the happening of the accident, not its effect.[11] That the employee sustained injury to his elbow, where he had a prior existing condition, just as petitioner did, was held to relate only to the amount of his recovery.

But this discussion misses the mark. There is no problem of connecting misstatements with the accident or injury. Unless the fraud is deemed to violate public policy, as Rock's did, the applicant becomes an employee and though his contract may be subject to rescission, he may not be barred from recovery under the FELA. On this view it is immaterial whether there was any relationship between the misstatement and the accident or injury.

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[11] See also *Long* v. *Big Horn Construction Co.*, *supra*.

Conclusion

For these reasons we submit the action of the trial court was erroneous and should be reversed and this case remanded with instructions to the trial court to entertain favorably a motion by petitioner to strike the defense of fraud heretofore interposed by respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. [redacted] 1981

No. [redacted]

CARL SHELL, *Petitioner*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation, *Respondent*

On Writ of Certiorari to the Circuit Court of Mercer County, West Virginia

BRIEF OF NORFOLK AND WESTERN RAILWAY COMPANY IN OPPOSITION TO MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO FILE A BRIEF AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960

No. 713

CARL STILL, *Petitioner*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation, *Respondent*

On Writ of Certiorari to the Circuit Court of Mercer County, West Virginia

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BRIEF OF NORFOLK AND WESTERN RAILWAY COMPANY IN OPPOSITION TO MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO FILE A BRIEF AS AMICUS CURIAE

Respondent, Norfolk and Western Railway Company, desires to oppose the Motion of the Brotherhood of Railroad Trainmen for leave to file a brief as amicus curiae herein, for the reason that the "collective bargaining contract" referred to in said Motion and Brief

is not a part of the record in this case, and, therefore, should not be considered by the Court in its decision of this case.

On page 1 of the Brief proposed to be filed by the Brotherhood of Railroad Trainmen, the following statement is made.

> "This case squarely presents the issue of the meaning and effect of the Brotherhood's collective bargaining contract which requires the respondent to reject an application for employment within 30 days".

Therefore, it appears that the only point sought to be argued by the Brotherhood is a provision of the "collective bargaining contract" which is not a part of the record in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]

No. [redacted]13

CARL STEELE,

Petitioner,

v.

THE NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA.

BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 713

CARL STILL,

Petitioner,

VS.

THE NORFOLK AND WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AS AMICUS CURIAE.

Preliminary Statement.

Interest of the Amicus Curiae.

This case squarely presents the issue of the meaning and effect of the Brotherhood's collective bargaining contract which requires the respondent to reject an application for employment within 30 days. Respondent, despite the

time limitation provided in the applicable collective bargaining contract, based its defense to the petitioner's action under the Federal Employers' Liability Act on the petitioner's alleged fraud in his application for employment which was filled out more than six years before the petitioner's accident. The trial court directed a verdict for respondent and thereby nullified the contractual time limitation established by the Brotherhood's contract.

The nature of the interest of the Brotherhood of Railroad Trainmen in this case is twofold: 1) The Brotherhood is interested because the ruling of the trial court nullified and set aside the time limitation which the Brotherhood had established by contract. 2) The Brotherhood's interest is also involved because one of its members was denied his right to a jury trial under the Federal Employers' Liability Act by means of a contract or device prohibited by Section 5 of that Act, 45 U.S.C. 55.

It is our position that the court below erred because it voided the contractual provision establishing a time limitation and because it permitted the respondent to avoid its liability despite the provisions of Section 5, 45 U.S.C. 55.

ARGUMENT.

I.

The 30 day time limitation provided in the applicable collective bargaining agreement within which respondent was required to reject applications for employment created an absolute right to seniority as an employee, after the expiration of the 30 days, as against any claim by the respondent that the application for employment contained misrepresentations of any nature.

The action of the trial court in ruling that petitioner was not an employee, based on alleged misrepresentation made by petitioner in his application for employment over six years before his injury, erroneously nullified the collective bargaining contract between this Brotherhood and respondent. For this error alone, the judgment of the trial court should be reversed. An affirmance thereof would be unwarranted in law and unwise in fact. As a matter of law, the contract involved is clear and unambiguous and, being so, it requires that petitioner be considered an employee for all purposes including that of bringing an action under the Federal Employers' Liability Act. *45 U.S.C. § 51, et seq.* As a matter of fact, the action of the trial judge constituted a rewriting of the collective bargaining contract so as to exempt rights granted by the FELA from that contract. No such exemption is justified. This plain error should be reversed because the petitioner thereby was denied substantial justice and in order to take the trial courts out of the business of rewriting collective bargaining contracts.

The relevant facts are few, simple, and undisputed. Petitioner first applied for employment with respondent over six years before the injury involved in this case. At

that time, he filled out his only application for employment. Respondent complained below that he therein misrepresented his physical condition even though petitioner was contemporaneously given a physical examination. Petitioner was discharged before his accident and was off work for over a year. Before his accident, petitioner was rehired by respondent and put to work without either a physical examination or an application for employment.

Throughout this period, the applicable collective bargaining contract provided in Section 17 (c):

> "Applications for employment will be accepted or rejected within thirty (30) days. If not notified within thirty (30) days, applicant will be considered accepted."

Petitioner below raised many objections to the trial court's ruling that petitioner, as a matter of law, was not an employee or respondent. The single paramount issue in this case, however, is that the petitioner was an employee because he was entitled to such rights by virtue of the fact that he was never notified that his application for employment was rejected, either within the 30 day period provided or thereafter. The trial court committed clear error in directing a verdict for respondent on its finding that plaintiff was, as a matter of law, not an employee and not entitled to bring an action under the Federal Employers' Liability Act. That error is manifest whether the trial court ignored the collective bargaining provision or whether it decided that the provision was not applicable. The meaning and effect of that provision was, of course, a question of the construction and effect of a written instrument and was, therefore, a question of law exclusively for the court rather than for the jury. *Swift & Co.* v. *Hocking Valley R.R.* 243 U.S. 281. That question of law was simple and uncompli-

cated. As this Court held in *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Borum*, 286 U.S. 447, 449, in interpreting a similar rule:

> "The application was not rejected within 30 days, and, under rule 22, must be deemed to have been finally accepted."

Since petitioner was an employee for all purposes under the collective bargaining agreement, he was entitled to the protection of the federal acts. *Blanton* v. *Northern Pac. Ry.*, 215 Minn. 442, 10 N.W. 2d 382 (Point 2 of Court's syllabus: "Where plaintiff had worked for railroad more than 90 days when injured and had not been rejected, he became an employe of railroad under railroad's rule relating to applicants for positions in its yard service, and, as such, he was under the protection of the federal employers' liability and safety appliance acts.") Here the collective bargaining contract was received in evidence and, for that reason, the instant case differs from the majority of those cases in which courts, other than this Court, have ruled on defenses based on an alleged fraudulent employment application. The instant case also differs from the first case in which this Court ruled on the affirmative defense asserted here, the case of *Minneapolis, St. P. & S. Ste. Marie Ry.* v. *Rock*, 279 U.S. 410 (1929). Mr. Justice Butler wrote *that* opinion and in *Minneapolis, St. P. & S. Ste. Marie Ry.* v. *Borum*, 286 U.S. 447, 450 (1932), distinguished the *Rock* case because *Rock* had failed the physical examination required and had then obtained another man to take his physical examination when he applied again under a different name. The *Rock* case is also different from the instant case in that there was no evidence that any collective bargaining contract was applicable.

The factual differences between the instant case and *Rock* are manifest but if a time period had been proved in evidence there, *amicus* would yet contend that *Rock* is completely distinguishable here. Because the application there was accepted by use of an impostor for the second physical examination, that case has been distinguished as a case concerning a void, rather than a voidable, contract because the fraud went to the very factum of the contract of employment. *Neukirk* v. *Los Angeles Junction Ry.*, 21 Cal. 2d 308, 131 P. 2d 535, 543. This Brotherhood would nevertheless assert that the railroad in such circumstances should be required to prove that it had no knowledge of the impersonation at the physical examination before the injury in order to defeat any railroad policy of "lay and wait". *White* v. *Thompson*, 181 Kan. 485, 312 P. 2d 612 (1957). Moreover, *amicus* asserts that the mere fact of application under an assumed name does not waive the provisions of its collective bargaining contract for such applications were contemplated by the parties to these contracts. This is so because one of the purposes that this Brotherhood had in obtaining such contractual provisions was to destroy a railroad policy of blacklisting applicants who had been engaged in union activity on other railroads. This is further so because an additional purpose of this Brotherhood was to put an end to a practice by railroads of discharging employees who filed suit under the Federal Employers' Liability Act. (Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-40, Report to Senate Committee on Interstate and Foreign Commerce, 77th Congress, Vol. I*, p. 37, 38 (1947)).

Since this Court's opinion in *Borum*, other courts have required that railroads prove that the misrepresentation must be of a physical condition and must bear a causal relation to the injuries sustained (The cases are exhaustively

discussed in *White* v. *Thompson*, 181 Kan. 485, 312 P. 2d 612.) Where its collective bargaining contracts are involved, this Brotherhood asserts that the railroad may not defend on allleged misrepresentations of physical condition whether the physical condition involved bears any "causal relation" to the injury or not. Absent such a contract, it is impossible to understand how such physical condition can bear a "causal relation" to the injury and thereby bar the employee's rights under the Federal Act. This is especially so when the 1939 Amendments to the Federal Employers' Liability Act are considered which broadened the class of employees covered by the Act and obliterated the defense of assumption of risk. In so doing, Congress removed the fetters which hobbled the full play of the basic congressional intention to leave to the jury the single question whether the negligence of the employer played any part, however small, in the injury involved in the suit, *Rogers* v. *Mo. Pac. R.R.*, 352 U. S. 500, 508, 509.

As this defense is now presented to juries, the jury is instructed that if there is any "causal relation" between the physical condition allegedly misrepresented, the jury should find for the employer. Under such instructions, the jury could find for the employer, though the evidence was overwhelming that employer negligence caused the injury, if the jury found that the physical condition at least partially contributed to cause the injury. With such findings, the basic congressional purpose could again be thwarted in such cases. Furthermore, no purpose is served in those cases where the employees' only physical condition is the condition allegedly misrepresented since the railroad can prove that the plaintiff has no injury but is seeking to recover for a pre-existing physical condition. Moreover, if the railroad is not negligent, the employee cannot recover no matter what his injury.

Unfortunately, the holdings in the cases which have interpreted *Borum* have used language which has been seized upon by the Referees of the National Railroad Adjustment Board. The awards involved concern employees who have been discharged and are seeking reinstatement from the Board. Unlike the Court decisions, the awards are not limited to alleged misrepresenfations as to physical conditions but include almost all types of alleged misrepresentations. The referees have relied on the Court decisions to deny reinstatement to employees who have been discharged following their lawsuits ostensibly because of misrepresentations in their application for employment and this is done despite collective bargaining contracts which create a time limitation on the right to discharge. Such was not the case before this defense was discussed by this Court. In one of the first cases before the First Division, the employer and employee representatives, without the necessity of a referee, held that the 90 day period there involved was a binding limitation. The division stated that the railroad had 90 days to make an investigation concerning the application and that the discharge was not justified when the time limit had expired. Reinstatement of the employee was ordered with seniority unimpaired and with pay for all time lost. *Award No. 66, Volume I, First Division Awards, NRAB.*

The time limits in such agreements were gradually chipped away by referees who are now uniformly used in reinstatement cases because of the failure of the division to reach agreement in such cases and, indeed, in almost all cases. The method used has been to seize on the discussion of "void" and "voidable contracts" in the judicial opinions and then to disregard the time limits entirely. The referees have refused the argument of the employees that their

contracts bar the discharge by ignoring the contracts and by relying on the court opinions. The method is clearly shown in *Award 16747, Volume 119, First Division Awards, NRAB*. There the referee states that the time limits have no application where "the employee engages in certain wilful and material falsification." The discharge is then upheld though the employee passed his physical examination when he applied for employment because of his back condition which is said to make him ". . . in a degree unfit, or at least undesirable, as an employee." Finally, Award 66 is rendered nugatory by the following sentences:

> "In Award 8302 this Division, the Referee Bakke, noted that the record in Award 66 does not disclose that the case of *Minneapolis, St. Paul, and Sault Ste. Marie versus Rock* 279 U. S. 410 came to the attention of the Board. That case supports the principle on which this decision rests."

The First Division's disregard of the time limits reached its culmination in *Award 19557, Vol. 144, First Division Awards, NRAB* (1960). There the referee asininely construed the time limit to apply only "to the application on its face" and denied the claim for reinstatement. The referee also showed particular solicitude for the carrier because it had paid two claims respectively of $644.50 and of $2,250.00.

These awards and many others raise a serious question as to whether the First Division is not exceeding its jurisdiction which is limited by the Railway Labor Act to disputes ". . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ." *45 U.S.C. § 153 First (i)*. Far from interpreting and applying the contract, the Division seems to have adopted a policy of approving the discharge of employees who have asserted their rights under

the Federal Employers' Liability Act. Before this Court's opinion in *Chicago R. & I. R.R.* v. *B.R.T.*, 353 U.S. 30, the employees were free to strike when they were incensed by discharges in violation of their contract. Recently, all possibility of relief was taken away from the employees because of the decision by this Court in *Union Pacific R.R.* v. *Price* 360 U. S. 601 with its holding that an Adjustment Board Award denying reinstatement does not constitute a "money award" under the Railway Labor Act and that such an award is final and binding on the discharged employee.

The present disregard of the time limits established by contract arose because of this Court's decisions on the affirmative defense involved and because there has been no square holding by the courts that the time limit provided creates an absolute right to employee status once the time limit has expired. This Court, it is submitted, should decide this case on the basis of the time limit in the collective bargaining contract, should reverse the judgment herein, and should deny the affirmative defense asserted by the respondent.

II.

The conduct of respondent in disregarding the time limit established by rule and in relying on the terms of the application for employment contradictory thereof constituted the use of a contract, rule, regulation, or device prohibited by Section 5 of the Federal Employers' Liability Act.

Despite the clarity of the contract establishing the 30 day limit in this case, the carrier on its employment application form asserted the right to discharge the applicant without a hearing at any time if it found that a false representation

had been made. Following the trial below, respondent held a hearing and discharged the petitioner.

The respondent below in relying on the language contained in its application form sought, thereby, to affect the petitioner's right to sue under the FELA. Because of the unusual ruling of the trial court in holding that petitioner was not an employee of respondent as a matter of law, and that petitioner was not entitled to go to the jury on the question of "causal relation" between the physical condition allegedly misrepresented and the accident for which suit was brought, it is apparent that the trial court placed unusual emphasis on the employment application and disregarded the time limit established by the collective bargaining contract. In doing so, that court also disregarded all the cases which require such proof when the contract is declared to be "voidable". Such decision in this case had the effect of rendering the petitioner's contract "void" though there is no case which so holds in like circumstances. The employment application, therefore, is blatantly an attempt to change the status of employees to that of "non-employees" when the respondent finds any "false representation" on its comprehensive employment application. Such a change of status is prohibited by Section 5, 45 U.S.C. § 55. That Section prohibits any contract or device which obstructs the right of Liability Act plaintiffs to secure maximum recoveries if they elect judicial trials of their causes. *Boyd* v. *Grand Trunk Western R.R.*, 338 U.S. 263.

The use of employment applications so as to adversely affect the employees rights under the Federal Act is not unique. An attempt was so made in *Byler* v. *Wabash R.R.*, 8th Cir., 196 F. 2d 9, 12, to revive the defense of assumption of risk and was held void. A railroad attempt based on a

Pullman Company application was held to be an attempt to avoid obligations imposed by Congress in *Oliver* v. *Northern Pac. Ry.*, D. Ct., Washington, 196 F. 432. Likewise, a railroad attempt by means of its employment application to require the employee to assume the risk of close clearance under all bridges on the line was held void under Section 5. *Davis* v. *Crane*, 8th Cir., 12 F. 2d 355.

The instant case is a direct violation of Section 5 in that the respondent by its application obtained the judgment below which barred petitioner from the jury trial to which he was entitled. A broader question is also presented by this case because of the subsequent discharge of petitioner: Is an attempt by a railroad to compel the petitioner to choose between his rights under the Federal Act and his right to a job a violation of Section 5? *Amicus* submits that such compulsory choice is a violation thereof. It is also clear that the First Division has placed its stamp of approval on those railroads which are again enforcing this compulsory choice. See, e. g., *Award 19869, Docket 37104, Awards First Division, NRAB* (Not yet bound) (March 3, 1961) (Employee's lawyer alleged that he could not perform his duties. Case was settled before trial. Misrepresentation was omission of 6 days employment at Post Office during Christmas season during which employee strained thumb and left shoulder. Examining doctor at that time found employee to have arthritis. Judicial Notic taken that if arthritis known, carrier would have investigated period before 5 year period which it inquired about on employment application and would have discovered other conditions. Reinstatement denied.)

The courts have not been more considerate of the employee's seniority rights. In *Scarano* v. *Central R.R. of N.J.*, 3rd Cir., 203 F. 2d 510, it was held that an "estoppel",

for want of a more precise word, prevented an employee from obtaining his job back after trial where the railroad refused to give the employee the physical examination to which he was entitled under the applicable collective bargaining contract.

It is submitted that the respondent, for the reasons adverted to above, has engaged in practices which are void under Section 5 of the Federal Employers' Liability Act.

CONCLUSION.

In our discussion, we have shown that respondent has violated the applicable collective bargaining contract in asserting that petitioner was not an employee at the time of his accident and injury. The court below erroneously accepted respondent's contention and entered an erroneous judgment for respondent. We further pointed out that the use made of the employment application in this case is prohibited by Section 5 of the Federal Employers' Liability Act.

We submit that the decision of the court below is not only erroneous under the case law dealing with such affirmative defenses but is also erroneous by virtue of Section 5 of the Federal Employers' Liability Act.

Respectfully submitted,

JOHN J. NAUGHTON,
Attorney for the Brotherhood of Railroad Trainmen as Amicus Curiae.

CERTIFICATE OF SERVICE.

I, John J. Naughton, attorney for the Brotherhood of Railroad Trainmen, amicus curiae, do hereby certify that on the 6th day of September 1961 I served the attached brief of amicus curiae upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Mr. Walter W. Burton, Law Building, Princeton, W. Va., and to Sachs and Jenkins, Woodward Building, Washington 5, D. C., attorneys for Petitioner; and to Mr. Joseph M. Sanders, Law and Commerce Building, Bluefield, W. Va., attorney for Respondent.

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JOHN J. NAUGHTON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 48

CARL STILL, *Petitioner*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Respondent*

On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

---

BRIEF FOR RESPONDENT

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---

BRIEF FOR RESPONDENT

OPINIONS BELOW

The judgment of the Circuit Court of Mercer County, West Virginia is unreported. However, the judgment is printed at page 19 of the Record. The Court's opinion appears at page 465 of the Record.

The judgment of the Supreme Court of Appeals of West Virginia is also unreported. The Order refusing to grant petitioner a writ of error and supersedeas to

the judgment of the Circuit Court of Mercer County, West Virginia appears on page 510 of the Record. The refusal to grant the writ of error and supersedeas was unanimous. Under the rules of the Supreme Court of Appeals of West Virginia, had any judge voted in favor of granting the writ of error and supersedeas, this would have appeared in the order of refusal.

QUESTION PRESENTED

1. Did the trial court err in directing a verdict in favor of respondent where the evidence showed without substantial conflict that petitioner willfully, intentionally and fraudulently misrepresented his true physical condition; that, if such misrepresentation had not been made, respondent would not have hired petitioner; that respondent's medical examiners were, in fact, mislead by the misrepresentations without dereliction on their part; and that there was a direct casual connection between the false representation and the injuries alleged to have been sustained.

INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT

The petitioner's statement contains many inaccuracies, and omits much that is necessary for a proper understanding of the case. We will, in our Statement of Facts, correct these inaccuracies and supply the omissons.

KIND OF ACTION AND PROCEEDINGS IN TRIAL COURT

This is an action instituted by petitioner against respondent under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, to recover for personal injuries alleged to have been sustained by petitioner

in respondent's west railroad yard at Bluefield, West Virginia, on January 23, 1958, when an empty coal car on which petitioner was riding, while engaged in a switching operation, was coupled to by a following train of sixty-nine empty coal cars. In petitioner's Amended Declaration (R.10), it was alleged that petitioner was "knocked off of the car upon which he was riding" and that petitioner "sustained a permanent and severe spondylolisthesis due to the dislocation of his spine from the sacrum"; that as a result of said accident several vertebrae in petitioner's back "were broken, crushed and dislocated" (R.11).

At a pre-trial conference held in this action on August 10, 1959, petitioner's attorneys stated that *prior* to January 23, 1958, petitioner had had no back injuries or back disabilities, and "had never been to a doctor" (R. 42-3).

At the trial respondent pleaded the general issue and filed its Special Plea No. 1, and its Amended Special Plea No. 1, which Pleas alleged in substance that in petitioner's written Application for Employment with respondent dated July 24, 1951, and in response to questions propounded to petitioner by respondent's medical examiner at that time, petitioner had made certain false and fraudulent answers with respect to his health and physical condition, his previous accidents, injuries and illnesses, and his past military service, and medical discharge therefrom.

The said Special Pleas filed by respondent further alleged that for many years prior to his employment by respondent in July 1951, petitioner had suffered with a severe spondylolisthesis; that petitioner had been discharged from the United States Army on January 31, 1946, by reason of said spondylolisthesis—a

medical discharge—and had received a pension for such disability from the United States Government for a period of approximately three years; that petitioner had suffered with rheumatism which caused serious disability of his back, and had been involved in an automobile accident in which he had injured his back, and which had disabled him.

Respondent contended at the trial, and proved conclusively, that the low back condition known as spondylolisthesis, which petitioner had while in the United States Army in 1945 and 1946, and for which he was discharged, and for which he received a pension, was exactly the same condition which petitioner had immediately following his alleged accident, and at the time of the trial, and which petitioner sought to attribute to the alleged accident of January 23, 1958.

Petitioner objected to the filing of respondent's Special Plea No. 1, and Amended Special Plea No. 1, but the Court overruled said objections and permitted said Special Pleas to be filed.

Thereupon the case was tried before a jury and when all of the evidence had been introduced, respondent moved the Court to direct the jury to find a verdict in favor of respondent, on the ground and for the reason that petitioner's employment with respondent had been procured by fraudulent representations with respect to petitioner's health, physical condition, prior illnesses and accidents, prior Army Service and medical discharge, and that such fraudulent representations had a direct causal connection with the injuries alleged to have been sustained by petitioner.

The Court sustained respondent's motion, and the Court's opinion appears on pages 465-73 of the Record. In the course of its opinion the Court said: "I can't

imagine a stronger case of direct causal connection between the misrepresentations and the injuries complained of than we have in this particular case * * *".

STATEMENT OF FACTS

1. PETITIONER'S EMPLOYMENT BY RESPONDENT, AND HIS ALLEGED INJURY OF JANUARY 23, 1958.

Petitioner was employed by respondent as a yard brakeman on July 24, 1951, after having filled out, *unassisted*, and signed, a written Application for Employment (R. 371-2, 224-8), and having been examined by respondent's medical examiner. During this examinaton the medical examiner asked petitioner certain questions pertaining to his previous military service, medical discharge, illnesses, injuries, etc., and wrote down petitioner's answers on a card furnished for that purpose, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (R.249, 483). The Application for Employment referred to was admitted in evidence as Defendant's Exhibit No 4 (R.225, 480).

Petitioner continued working for respondent as a yard brakeman until January 23, 1958, the date of his alleged injuries, except during the period October 1956 to November 18, 1957. In October 1956 petitioner was dismissed from service for deserting his crew (R.145). He was held out of service by respondent until petitioner's labor organization, the Brotherhood of Railroad Trainmen, interceded for petitioner. It was then agreed that petitioner would be *reinstated* to his job, *with seniority rights unimpaired*, but would not receive pay for time lost (R.395-6, 436-8, 454-5). The agreement under which petitioner was reinstated is set forth in a letter from H. C. Wyatt, respondent's Vice Presi-

dent and General Manager, to K. H. Jones, dated November 8, 1957—Plaintiff's Exhibit No. 21 (R.454, 474). When petitioner was reinstated he was not required to file an application for employment, and was not required to, and did not submit to a physical examination (R.419-21, 424). He was, however, required to have his eyes and hearing examined (R.424). The record of this examination was admitted in evidence as Defendant's Exhibit No. 32 (R.420, 510). After petitioner was reinstated to his former employment, his seniority dated from July 24, 1951 (R.436-8). There is no evidence to the contrary.

Although petitioner testified that he was a regular worker and never lost any time from work on account of sickness or disability (R. 263-4, 288), that he worked eight hours a day and "five days every week," and frequently worked "overtime" (R. 193-4), and had no difficulty performing his duties as brakeman from 1951 to January 23, 1958, the date of his alleged injury, it appears from petitioner's work record from July 1951 to February 1958—Defendant's Exhibit No. 29 (R. 375-6, 506)—that during said entire period, petitioner was a very *irregular* worker, and lost many days in nearly every month during said period by reason of sickness, or other unexplained absences from work. In many cases petitioner's work record showed merely that petitioner was "off by permission". Petitioner did not attempt to explain why he lost so much time from work by reason of sickness, or why he was "off by permission" so frequently.

Petitioner had been employed by respondent on two previous occasions. On May 25, 1943, petitioner, having applied to respondent for work as a track laborer, was examined by Dr. J. C. Gordon, respondent's medi-

cal examiner, and was approved for such employment. During this examination Dr. Gordon asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in petitioner's answers on a card furnished by respondent for that purpose. Defendant's Exhibit No. 8 (R. 257, 491). However, petitioner worked only one day during the first half of June, 1943, and earned $8.80 (R. 352-3). He quit voluntarily.

Then again on September 27, 1948, petitioner applied to respondent for employment as section laborer, and at that time filled out and signed a written Application for Employment—Defendant's Exhibit No. 6 (R. 251, 486). On the same date petitioner was examined by Dr. Roy E. Christie, respondent's medical examiner. Dr. Christie asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in the answers on a card furnished by respondent for that purpose—Defendant's Exhibit No. 7 (R. 255, 488). Petitioner reported for work on September 29, 1948, at 7:00 o'clock A.M. and worked three hours and voluntarily quit (R. 352-3). Petitioner remembered only *one* previous employment by respondent (R. 221-2).

At the time of petitioner's alleged injuries—January 23, 1958, at 12:30 A.M.—petitioner was employed by respondent as a yard brakeman in respondent's west yard at Bluefield, West Virginia.

Prior to petitioner's alleged injury, he and several of respondent's other employees were engaged in classifying cars—breaking up a train of empties and placing them upon the classification tracks. The west yard of respondent declines toward the west and cars and trains could travel by gravity in a westerly direction.

At the time of petitioner's alleged accident, petitioner and the other brakemen were engaged in breaking up and classifying a train of sixty-nine empty cars. A steam locomotive, on the east end of the train, was shoving the cars. As the train proceeded slowly in a westerly direction, the brakemen, sometimes referred to as car cutters, would cut off one or more cars from the west end of the train, and a brakeman would ride each car, or cut of cars, down to the classification tracks—12 in number— and place same upon the proper tracks. The cars traveled by gravity toward the west. It was not customary, when there was a sufficient number of brakemen to ride the cars to the classification tracks, to stop the train as each car, or cut of cars, was cut off from the train (R. 102, 127-8, 355-6, 392-3, 448). Ordinarily when the car, or cut of cars, was cut off from the train, it would drift on down the track away from the train from which it had been cut off. There were sufficient riders at the time of petitioner's alleged accident, and, therefore, it was not intended that the train would be stopped as each car, or cut of cars, was cut off from the train (R. 355).

As the train of sixty-nine empties moved slowly westward at a speed of approximately three or four miles per hour—the usual and customary speed during such switching operations (R. 101-2, 123-5, 131, 355, 361)—petitioner was directed by the Conductor in charge to get on the car in question and take it to the shop track. Cars needing repairs are placed on the shop track. Petitioner got on the last car on the train and mounted the brake step on the east end of the car, and *applied the brake* (R. 154-5, 159, 161-2, 266-8, 277), and petitioner's car was cut off from the train by another brakeman, and the car drifted down-

grade toward the west and away from the train from which it had been uncoupled (R. 155).

However, for some unknown reason, the train began to overtake the car, and the Conductor observing this, gave the Engineer a signal to stop (R. 356). However, before the Engineer could stop the train, it coupled to the car on which petitioner was riding and petitioner claims that the coupling of the train to the car on which he was riding, threw him against the end of the car and injured him.

After the car in question was cut off to petitioner, it traveled for approximately three or three and a half car lengths before the train overtook it and recoupled to it (R. 162). A car is approximatey forty feet long. Apparenty the distance separating the west end of the train and the car on which petitioner was riding was at no time more than approximately twenty feet (R. 356-61). A witness for the petitioner testified that the car was never more than six feet from the end of the train (R. 102, 105). Another witness for petitioner testified that "the train followed it (the car) and *gradually* caught up with it" (R. 131). Another witness for petitioner said that the train "was moving *slowly* in a westerly direction" (R. 123).

When petitioner's witness, a yard brakeman, saw that the train was overtaking the car on which petitioner was riding, he ran to the car to prevent it from coupling. The coupling apparatus could be operated without going between the cars. However, the yard brakeman did not reach the train in time to prevent it from coupling to the car. It did not occur to the yard brakeman that petitioner was in any danger, but the former knew that if the train coupled to the car,

that the train would have to be stopped in order to uncouple the car, and that this would delay the movement of the train (R. 124-5). To the same effect see the testimony of the conductor (R. 356).

Petitioner's witness, another yard brakeman, testified that he was on the train in question at the time it coupled to petitioner's car; that he was about three or four cars to the west of the car on which petitioner was riding; that the coupling of the train to petitioner's car almost knocked him, the witness, off the car on which he was riding (R. 86). However, he was not thrown from the car and was not injured in any way (R. 91).

It further appeared from the evidence that respondent's rules in effect at the time of petitioner's alleged injury, permitted a train traveling at a speed of four miles per hour to couple to a *standing* car; that this method of coupling was customary and perfectly safe, and that it was not customary for the brakemen to leave the cars during such coupling operations (R. 393, 445-7).

The evidence further showed that whenever a train such as this stops, there is always "slack action"; that this slack action cannot be prevented, and that the brakemen can hear the slack running out in ample time to protect themselves. There is no evidence to the contrary (R. 445, 447).

Although petitioner claims that he was seriously injured on January 23, 1958, as a result of the above mentioned coupling operation, and that he thereby became totally and permanently disabled, he was seen and examined by an orthopedic surgeon on the day following his alleged injury. However, at that exam-

ination petitioner did not complain of his *back*. The only complaint that petitioner made was with reference to pain in his left hip and left thigh. The surgeon stripped petitioner and examined him, but found no bruises, wounds, contusions or lacerations on petitioner's body (R. 428-9, 432). He had x-rays made of petitioner's left hip and left femur. No x-rays were made of petitioner's back, for the reason that he was not complaining of his back at the time. The surgeon did not discover that petitioner had a spondylolisthesis at the time of the above mentioned examination (R. 432).

One of the yard brakemen testifying for petitioner stated that immediately following the alleged accident, petitioner was complaining he had hurt his *hip* and *leg* (R. 121). The written personal injury report made out by petitioner immediately following the alleged accident stated that his left hip and thigh were bruised. No complaint was made of an injury to the back (R. 133-4).

After the institution of this action, petitioner was examined at the request of his attorney, by another orthopedic surgeon, and at that time petitioner advised the surgeon that he had been knocked off of the car and fell down on the coupler, striking his back (R. 53, 63-4). Following the alleged accident, petitioner was also examined by a third orthopedic surgeon, and petitioner admitted he advised the surgeon that he was "knocked * * * completely off of the car" (R. 281-2). As a matter of fact, petitioner was not knocked off of the car. He remained on the car until it stopped and then climbed down off of the car unassisted (R. 357-8). Petitioner testified that he did not learn how the acci-

dent occurred, until he talked with his attorney several months after the accident (R. 274, 289).

Petitioner admitted that he was not knocked unconscious and did not receive a head injury (R. 297), and no witness testified that petitioner was knocked off of the car. The evidence showed clearly that after the car stopped, that petitioner climbed down off of the car unassisted.

2. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

On July 24, 1951, petitioner, *without assistance,* (R. 371-2) filled out and filed with respondent, his application for employment as a yard brakeman. Defendant's Exhibit No. 4 (R. 225, 480).

This application was filed by petitioner with a clerk in the office of the Terminal Train Master at Bluefield, West Virginia. The Clerk gave petitioner the application form, and, according to respondent's rule and custom, required petitioner to fill out and sign the application. Petitioner neither asked for, nor received assistance in filling out the application (R. 372).

Thereupon petitioner, as directed by the clerk, went to respondent's Division Office at Bluefield, and there was examined by respondent's medical examiner. The medical examiner interrogated petitioner with reference to petitioner's medical history, his physical condition, his past accidents and illnesses, and medical discharge from the military service, and filled out a card containing the questions and petitioner's answers, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (R. 249, 483). The medical examiner, relying upon the truth of the answers given by petitioner, approved peti-

tioner for employment by respondent as a yard brakeman (R. 413-16).

The medical examiner and other officials of respondent, testified that during petitioner's employment by respondent, and prior to his alleged injury, that they had no reason to believe that he had made false answers in his application for employment, or to the medical examiner (R. 395, 421, 444).

Petitioner's Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—which was *filled out* and *signed* by petitioner (R. 371-2), contained the following question and answer:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of only *one* employer, and stated that he had been employed by such employer from November, 1948, to July, 1951.

The evidence shows without conflict, however, that petitioner had also been employed by five other coal companies (R. 202, 217-20, 487).

The application signed by petitioner—Defendant's Exhibit No. 4 (R. 225, 480)—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, *or given a medical discharge*".

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged".

It is true that petitioner received an Honorable Discharge from the Army, which was admitted in evidence as Defendant's Exhibit No. 3 (R. 213, 477-80). However, on the back of the Honorable Discharge appears the following:

> "40. Reason and authority for separation Certificate of Disability for Discharge. U P Section 1 AR 615-361."

Petitioner admitted, however, (R. 141-2, 212, 229-30, 257-8) that when he was discharged from the Army on January 31, 1946, that he received a CERTIFICATE OF DISABILITY FOR DISCHARGE, and this Certificate was admitted in evidence as Defendant's Exhibit No. 12 (R. 304, 493), and reads in part as follows:

> "7. After careful consideration of all information obtainable and a critical examination, we find this individual unfit for military service because of:
>
> Spondylolisthesis, second-degree, severe, secondary to congenital defects of lumbo sacral junction. Manifested by chronic pain in lower back. Soldier cannot be rehabilitated to perform effective military service. Will be discharged to own care."

As above mentioned, petitioner admitted that when he was released from the Army, that he received a Certificate of Disability for Discharge. We quote from petitioner's testimony:

> "Q. When were you in the Army?
> A. I went to the Army July 18, 1945.
> Q. And when did you get out?

A. I got out January 31, 1946.

Q. What type of discharge did you receive?

A. C. D. D.

Q. What does that mean?

A. It is a certificate of disability for discharge" (R. 141).

"Q. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?

A. Yes, sir.

Q. After you got out of Camp Beale?

A. Yes, sir.

Q. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge.

A. Yes, sir." (R. 212-13).

"Q. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?

A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check or something. * * *. (R. 229-30)

The application in question—Defendant's Exhibit No. 4, R. 225, 480—also contained the following question and answer:

"Q. 14. Have you ever been injured? If so, when and at what place. No."

This answer was false. The evidence clearly shows, and petitioner *admitted*, that he was involved in an automobile accident in 1941 or 1942, in which he injured his side and back, and petitioner testified that this

injury was the cause of his discharge from the Army (R. 141-2, 207-10, 211-13).

Also see Defendant's Exhibit No. 18, (R. 311, 500), entitled ABBREVIATED CLINICAL RECORD, from which we quote:

> "In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees, and back. Heart flutter. Since this time has had intermittent back pain, made worse by wet, cold weather. Long periods of standing or walking, or carrying wts. will cause pain. Complete physical examination is negative, except for the following:
>
> *In 1941, in automobile accident, required painful back, had to sleep in special position on abdomen for 3 months because of pain.*" (R. 500)

We quote from the same Exhibit:

> "Patient presents a history of severely painful back which dates back to 1941. Nearly all ranges of back motion are limited and corresponding limitation of activity.
>
> "Working diagnosis or impression: Spondylolisthesis, 2nd degree, severe, secondary to congenital defects of lumbo-sacral junction." (R. 501).

We also quote from said Exhibit under RADIOLOGIC RECORD: (R. 501)

> "The fifth lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to 1/2 of the anterior posterior diameter of the body of the vertebrae, indicative of spondylolisthesis."

This is exactly the same condition that petitioner had following his alleged accident in January of 1958, *and at the trial (R. 56, 62, 235, 239-43, 319).*

The Physical Examination card prepared by respondent's medical examiner on July 24, 1951, when he examined petitioner for employment—Defendant's Exhibit No. 5 (R. 249, 483)—contains the following questions and answers:

> "Have you ever had: * * *
> Rheumatism: No.
> A medical discharge from the Military Service: No. (Honorable).
> Have you ever had a long or serious illness: No.
> What injuries have you ever received: No.
> Have you ever had Tumor, Ulcer, Physical Defect, or been operated upon? No."

All of the foregoing answers were false. Petitioner admitted that prior to his employment by respondent, that he had had a very severe attack of rheumatism which confined him to his bed for many months, and was involved in an automobile accident in 1941 or 1942, and that the rheumatism and personal injuries were the cause of his medical discharge from the United States Army (R. 208-9, 211-13, 214, 215, 259, 281).

Also see Defendant's Exhibit No. 18 (R. 311, 500-2), ABBREVIATED CLINICAL RECORD, which reads in part as follows: (R. 501)

> "History of present illness: Patient states his back first bothered him in the summer of 1942. States he was bedfast for three or four months, his complaint was diagnosed as rheumatism, he contends it was in all of his joints. Since that time

his back has given him trouble. Patient states that long walks or long standing gives him constant and severe pain. His back has always given him some pain on sentry."

We also call the Court's attention to Defendant's Exhibit No. 20 (R. 313, 503), CONSULTATION REPORT, from which we quote:

"History: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a medical discharge in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage."

The answer to the effect that petitioner had not received a medical discharge from the military service was likewise false, as it is entirely clear that petitioner did receive such medical discharge, and *knew* that he had received it. See Defendant's Exhibit No. 12 (R. 304, 493) CERTIFICATE OF DISABILITY FOR DISCHARGE, and petitioner's testimony (R. 141-2, 212-13, 229-30).

We also call attention to Defendant's Exhibit No. 13 (R. 305-6, 495) entitled VETERANS APPLICATION FOR PENSION OR COMPENSATION, which reads in part as follows:

"3. Nature of disease or injury on account of which claim is made and date each began.

> Heart flutters, rheumatism in my back and where my bones join together (last part of 1942), pains in my right side, come from where I had my ribs broken (last of 1941), has got bad since I have been in the Army."

It is clear from this Application that petitioner was claiming a pension for disability due to rheumatism since 1942, and personal injuries sustained in 1941.

Pursuant to the Veterans Application for Pension or Compensation filed by petitioner, the Veterans Administration, on March 21, 1946, wrote petitioner that he had been awarded a pension for disability resulting from spondylolisthesis incurred or aggravated during his World War II Service. See Defendant's Exhibit No. 16 (R. 309, 498). Petitioner did not deny that he *received* and *understood* this letter, and admits that he received the pension. Later, on July 20, 1948, this pension was discontinued for the reason that there had been no "superimposed injury" on petitioner's "congenital defect during service," and "that in the absence of superimposed injury or active pathology, service connection by way of aggravation may not be granted for such developmental abnormality." See Defendant's Exhibit No. 17, R. 310, 499.

The answer appearing in Defendant's Exhibit No. 5 (R. 249, 483) to the effect that petitioner had never had a "physical defect" was likewise false, as it was clearly shown that petitioner had a severe spondylolisthesis since prior to his induction into the Army in 1945.

Respondent's medical examiner testified that if, when he examined petitioner in July of 1951, petitioner had told him the truth concerning his spondylolisthesis, his

previous accident, illnesses and disabilities, and his Army service and medical discharge, he would not have approved petitioner for employment as a yard brakeman (R. 413-16), and that petitioner would not have been employed (R. 422).

Numerous other doctors who testified in the case said that if petitioner had spondylolisthesis in 1945 and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a person with a severe spondylolisthesis is easily injured (R. 65, 238-41, 320-1). An orthopedic surgeon on cross-examination by respondent's attorney testified:

> "In pre-employment x-ray study, if I saw a condition that looked like this (x-ray of petitioner's low back), I would advise against that man working as a brakeman, because there is too much possibility of him getting a symptomatic one *even in the ordinary activities of braking, not with any accident at all*" (R. 65).

The testimony of these doctors is not denied, and it is quite certain that if in July 1951 respondent's medical examiner had known the true facts concerning petitioner's physical condition and past medical history, that he would not have approved petitioner's employment.

At the trial of this case petitioner contended that his spondylolisthesis was readily discoverable on medical examination and that if respondent's medical examiner did not discover his condition, that he should have done so. The same contention is made in peti-

tioner's brief. However, the medical examiner testified that he gave petitioner a "screening examination" (R. 410, 423), and that he did not discover petitioner's condition. It also appears that petitioner had taken, and *passed*, numerous physical examinations, prior to his examination by the medical examiner, and apparently none of the examining physicians discovered petitioner's condition.

Petitioner was examined before induction in the Army (R. 203). He was also examined as mentioned above by an orthopedic surgeon the day following his alleged injury, but the surgeon did not discover his spondylolisthesis (R. 432). Petitioner also passed physical examinations for employment by six coal companies (R. 142-5, 202, 217-20, 487), and, according to his testimony, petitioner actually performed heavy work for all but one of these companies. Petitioner was employed by respondent in 1943 and 1948, but on neither of these occasions did the examining physician discover that petitioner had spondylolisthesis.

Therefore, it is understandable why respondent's medical examiner in 1951 did not discover petitioner's true condition, particularly in view of the false answers in petitioner's Application for Employment, and the false answers given to the medical examiner.

Before petitioner was employed by defendant in 1943, he was examined by one of respondent's medical examiners, and the record of this examination was offered in evidence as Defendant's Exhibit No. 8 (R. 257, 491). In this examination petitioner denied that he had ever received an injury, although, as shown above, he had been involved in an automobile accident *a year or two* prior to this examination, and was complaining of this injury while in the Army in 1945 and

in 1946. In fact, petitioner testified that this injury caused his discharge from the Army (R. 211-12, 214). Petitioner also denied to the medical examiner that he had ever had rheumatism. However, as above shown, petitioner admitted at the trial that he had suffered with rheumatism for several years, and his Army records, and the Veterans Administration records offered in evidence, showed clearly that petitioner had been afflicted with disabling rheumatism.

Petitioner also denied in this examination that he had ever had a physical defect, although it is an admitted fact that he did have a very severe spondylolisthesis. Petitioner did not deny that he gave such false answers to respondent's medical examiner in 1943. However, he said he did not *remember* being examined by him (R. 256-7).

In order to obtain employment with respondent in 1948, petitioner was required to fill out and sign a written application, which was introduced in evidence as Defendant's Exhibit No. 6 (R. 251, 486). In this Application the following question was asked:

> "9. Give record of all previous employment in date order (include military service, if any)".

In reply to this question petitioner stated that he had been employed by two coal companies, *but did not disclose that he had been in the Army in 1945 and 1946*, and did not disclose that he had been given a *medical discharge* from the Army on account of a severe spondylolisthesis, and had received a pension from this condition for many years. He also failed to give the names of many former employers. In particular, he failed to state that he had been employed by a fuel company for about one month, but had quit work "be-

cause of physical disability". Defendant's Exhibit No. 19 (R. 312, 502-3).

In answer to question 10 in the 1948 Application, petitioner also denied that he had ever been injured. In fact, he denied it three times (R. 487). We quote question 10, and petitioner's answers:

> "10. Have you ever been injured? If so, when and at what place: *None;* How did it occur: *None;* Extent of injuries?: *None.*"

We have heretofore shown that petitioner had been injured in an automobile accident in 1941, and that these answers were, therefore, completely false.

Before being accepted for employment by respondent in 1948, petitioner was also required to submit to a physical examination by one of respondent's medical examiners, who examined petitioner and asked him numerous questions concerning his past medical history, and filled out a Physical Examination card, which was introduced in evidence as Defendant's Exhibit No. 7 (R. 255, 488). In this examination—according to the card—petitioner denied that he had ever been injured, or that he had ever had a "physical defect". All of these answers were completely false, as above shown. Petitioner admitted (R. 250-2) that he *filled out*, and signed the Application for Employment in 1948, although he said that he did not *remember* making the Application for Employment, and did not remember being examined for employment on September 27, 1948, or May 25, 1943 (R. 250, 254).

The three last mentioned exhibits were offered by respondent for the purpose of supporting respondent's contention that petitioner's employment by respondent

in 1951 was procured by false and fraudulent representations, and that the same false and fraudulent representations were made by petitioner to two other of respondent's medical examiners in order to secure employment with respondent in 1948, and in 1943.

Although petitioner's Application for Employment dated July 24, 1951, Defendant's Exhibit No. 4 (R. 225, 480)—answer to question 10—showed that petitioner was employed by a coal company from November 1948 to July 1951, and petitioner testified that he had no difficulty whatever in performing work for the various coal companies which had employed him (R. 144), it appears that on December 11, 1950, about seven months prior to petitioner's employment by respondent, that petitioner filed with the Veterans Administration an Application for Hospital Treatment or Domiciliary Care—Defendant's Exhibit No. 14 (R. 308, 496). We quote from this Application (R. 497):

> "39. Brief History. In 1945 had trouble with back after maneuvers. Was given a brace by Army doctors to aid back trouble.
>
> 40. Symptoms. Severe (pain) in lower back region which totally disables patient for time being. Causes tremendous discomfort."

However, the Veterans Administration, on December 15, 1950, wrote petitioner as follows:

> "Your application for hospital care has been received and we regret to advise that the medical findings fail to show definite need of hospital treatment or domiciliary care." Defendant's Exhibit No. 15 (R. 308-9, 497).

It is true that petitioner testified that when he was examined by respondent's medical examiner on July 24, 1951, that this medical examiner did not ask him any questions. However, petitioner also testified on numerous occasions that he did not *remember* what he said to the medical examiner, or what the medical examiner said to him during this examination (R. 222-4, 246-9). The trial of this case took place approximately *eight years* following petitioner's examination in 1951 by the medical examiner, and, aside from the improbability that petitioner would remember the conversation with the medical examiner, petitioner repeatedly admitted that he had a very poor memory (R. 221-2, 228-9, 231-2, 250, 252, 254, 260-1). In fact, on one occasion petitioner testified "I can't hardly remember 1958". (R. 229) On another occasion when petitioner was having difficulty in remembering, he said "I guess I'll have to deny that because I don't remember" (R. 232).

Petitioner's poor memory was also demonstrated by his testimony to the effect that he did not remember whether he was *examined* when he was employed by respondent in 1943, and in 1948 (R. 222, 250), whether he was involved in an automobile accident in 1941, he being fifteen years of age at the time (R. 227-8), whether he was attempting to get in a Veterans hospital during the years 1948, 1949 or 1950 (R. 232), whether he was examined by a physician for the Veterans Administration in November of 1947 (R. 229). Although petitioner admitted that he had been examined by numerous doctors prior to July 1951, his recollection pertaining to these examinations was extremely hazy, and he remembered nothing whatever that was done or said during either or any of said examinations.

Petitioner advised his own physician, on May 15, 1959, that during his entire life he had had no previous difficulty with his back (R. 53, 63). Petitioner advised another physician selected by him a short time prior to the trial of this case, that he had had no previous back disability (R. 82).

Petitioner was examined by a neurosurgeon of the University of Virginia Hospital, at Charlottesville, Virginia, on August 19, 1959, and on that occasion petitioner advised the surgeon that prior to January 23, 1958, he "had never had any trouble with his back or his leg" (R. 234). A short time after petitioner's alleged injury, he went to Baltimore, Maryland, and was examined by an orthopedic surgeon. We quote from a letter dated June 17, 1958, from this surgeon to an attorney then representing petitioner:

> "According to (petitioner's) history, he was the epitome of health prior to his injury. He states that he was able to bend, twist, turn, do back flips and lift a couple of hundred pounds; *he had no previous difficulty of any kind with his back.*" (R. 456-7).

Subsequent to his alleged injury of January 23, 1958, petitioner was also examined by an orthopedic surgeon of Roanoke, Virginia, and on that occasion petitioner stated he had had no previous difficulty with his back (R. 321-3).

On November 4, 1947, a physician examined petitioner for the Veterans Administration, for the purpose of determining whether petitioner should be admitted to a Veterans hospital. At that time petitioner was complaining of "low back disability" and other ailments (R. 299). However, petitioner, at the trial,

refused to admit that he had been examined by this physician in November, 1947, or at any other time.

Petitioner not only misrepresented his previous back condition to every doctor who examined him, but misrepresented such condition to his own attorney, as will appear from the transcript of the pre-trial proceedings in this case (R. 42-3), from which we quote:

> "Mr. Sanders, Sr.: Well, let me ask you a question. Do you claim he never had been previously injured in the back?
>
> Mr. Walter G. Burton: I sure do.
>
> Mr. Sanders, Sr.: You claim that?
>
> Mr. Walter G. Burton: I claim that he had never been to a doctor, that he worked in the coal mines, about his back; that he could go up these ladders with his arms and without using his legs or his back, that he could go up them, he was that strong. He could go up those ladders with his arms.
>
> Mr. Sanders, Sr.: You claim he never had any previous back injuries or previous back disabilities?
>
> Mr. Walter G. Burton: *That's right; and had never been to any physician about those matters.*"

In explaining why he did not advise his own attorney as to his previous back condition, petitioner said "my back wasn't hurting me". (R. 280).

Petitioner not only misrepresented his physical condition to all the doctors who examined him, and to his own attorney, but actually carried his misrepresentations into the court room, and testified repeatedly that prior to his alleged injury of January 23, 1958, his back had never given him any pain or discomfort (R. 196, 292-3).

SUMMARY OF ARGUMENT

Petitioner had received a medical discharge from the United States Army in 1946, for a severe, second-degree spondylolisthesis which disabled him from performing effective military service, and had received a pension for his disability for over two years. This spondylolisthesis was aggravated by seriously disabling rheumatism and a personal injury. Shortly after his discharge from the Army, petitioner had quit work for Pocahontas Fuel Company on account of physical disability. On December 11, 1950—seven months before applying to respondent for work as a yard brakeman—petitioner had applied to the Veterans Administration for hospital treatment, or domiciliary care, on account of his low back disability.

Petitioner knew all of the foregoing facts on July 24, 1951, when he applied to respondent for work as a yard brakeman, but willfully and intentionally concealed these facts for the purpose of deceiving respondent and securing employment.

In October, 1956, petitioner was dismissed from service for deserting his crew. He was held out of service by respondent until petitioner's labor organization, the Brotherhood of Railroad Trainmen, interceded for petitioner. It was then agreed that petitioner would be reinstated to his job, with seniority rights unimpaired, but would not receive pay for time lost. When petitioner was reinstated, he was not required to file an application for employment, and was not required to, and did not submit to a physical examination. He was, however, required to have his eyes and hearing examined. After petitioner was reinstated to his former employment, his seniority dated from July 24, 1951.

According to the testimony of four doctors who examined petitioner following his alleged injury of January 23, 1958, a person with a severe spondylolisthesis such as petitioner had, is physically unfit for employment as a yard brakeman, and no medical examiner would have been justified in approving him for such employment had he known of such condition. There is no evidence to the contrary.

Relying upon the statements made by petitioner in his written application for employment, and to respondent's medical examiner, and the examination made by its medical examiner, and having no reason to believe that the statements were false, respondent employed petitioner as a yard brakeman. However, had respondent known the true facts, it would not have employed petitioner. Respondent did not discover the falsity of said representations until after the institution of this action.

Petitioner was examined before induction into the Army. He was also examined by an orthopedic surgeon on the day following the alleged accident, but the surgeon did not discover his spondylolisthesis. Petitioner, prior to his employment by respondent, also passed physical examinations for employment by six coal companies. Petitioner was also examined by respondent's medical examiner in 1943 and 1948, prior to his employment on those dates by respondent. Apparently his spondylolisthesis was not discovered by any of these doctors. Therefore, it is understandable why respondent's medical examiner, in examining petitioner on July 24, 1951, did not discover his spondylolisthesis, particularly in view of the false answers in petitioner's Application for Employment and the false answers given to respondent's medical examiner.

Petitioner's work record from July 1951 to January 1958 indicates clearly that petitioner was disabled from work several days in nearly every month in said period, which corroborates respondent's contention that petitioner was physically unfit for work as a yard brakeman.

There was a direct causal connection between petitioner's alleged injury and said false representations. If petitioner was injured, the only injury he received was an *aggravation* of a pre-existing spondylolisthesis. Had he not had this spondylolisthesis, the condition could not have been aggravated, and there would have been no injury.

Petitioner's fraudulent conduct is established beyond all reasonable doubt. Not only did petitioner conceal his prior physical condition and his medical discharge from the Army from Dr. Troup, respondent's medical examiner, but he deliberately concealed these facts from his own attending physicians, and his own attorney, and despite the positive proof to the contrary, testified repeatedly that prior to the alleged accident of January 23, 1958, he had never had any back disability. Having obtained employment with respondent by fraud, petitioner is not entitled to maintain this action.

ARGUMENT

1. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

(a) Petitioner Was Not Physically Fit For Work As a Yard Brakeman. No Medical Examiner Would Have Been Justified In Approving Petitioner For Such Employment.

Due to the strenuous nature of a yard brakeman's work, the physical qualifications of such work were considered by respondent to be the highest of any of its employees (R. 405).

The evidence showed clearly and conclusively that on January 31, 1946, petitioner was discharged from the United States Army for the reason that he had a severe, second-degree, spondylolisthesis, manifested by chronic pain in the lower back, and that he could not be rehabilitated to perform effective military service. See petitioner's Certificate of Disability for Discharge, Defendant's Exhibit No. 12 (R. 304, 493).

For confirmation of the diagnosis made by the Army doctors when petitioner was given a disability discharge, see

Defendant's Exhibit No. 13 (R. 305-6, 495)
Defendant's Exhibit No. 14 (R. 308, 496)
Defendant's Exhibit No. 17 (R. 310, 499)
Defendant's Exhibit No. 18 (R. 311, 500)
Defendant's Exhibit No. 19 (R. 312, 502)
Defendant's Exhibit No. 20 (R. 313, 503)
Defendant's Exhibit No. 23 (R. 314-15, 505)

Some of these exhibits show that since 1941 petitioner has suffered with seriously disabling rheumatism, and a seriously disabling personal injury. See:

Defendant's Exhibit No. 13 (R. 305-6, 495)
Defendant's Exhibit No. 18 (R. 311, 500)
Defendant's Exhibit No. 20 (R. 313, 503)

We have heretofore quoted extensively from the above mentioned exhibits.

Four doctors, including one called by petitioner, testified in substance that a person with a severe spondylolisthesis such as petitioner had was unfit for employment as a yard brakeman, and that a medical examiner would not be justified in approving petitioner for such employment (R. 65, 238-41, 320-1, 413-16). There was no evidence to the contrary.

We quote from the testimony of one of petitioner's physicians:

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic one even in the ordinary activities of braking, not with any accident at all" (R. 65).

It, therefore, clearly appears that petitioner, on July 4, 1951, was physically unfit for work as a yard brakeman, and that no medical examiner would have been justified in approving him for such employment.

(b) Petitioner Knew That He Had Received a Medical Discharge From the Army, For Spondylolisthesis; and Knew That He Had Been Seriously Disabled With Rheumatism and by a Personal Injury.

Petitioner was inducted into the United States Army on July 18, 1945, and was discharged on January 31, 1946. He received a Certificate of Disability for Discharge, which is commonly known as a disability or medical discharge. This much is entirely clear. Defendant's Exhibit No. 12 (R. 304, 493).

It is equally clear that petitioner *knew* on July 24, 1951, when he applied for employment with respondent, and was examined by respondent's medical examiner, that he had received a medical discharge. We quote from petitioner's testimony:

> "Q. 8. When were you in the Army?
> A. I went to the Army July 18, 1945.
> Q. 9. And when did you get out?
> A. I got out January 31st, 1946.
> Q. 10. What type of discharge did you receive?
> A. C.D.D.
> Q. 11. What does that mean?
> A. It's a Certificate of Disability for Discharge (R. 141).
> Q. 186. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge, didn't they?
> A. Yes, sir." (R. 212-13)
> "Q. 370. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?
> A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check, or something. They tell me about it in the Army. I don't know." (R. 229-30)

It also appears that on March 29, 1948, petitioner was examined by a Veterans Administration physician and that he gave the examiner the following history: Defendant's Exhibit No. 20 (R. 313, 503)

> "History: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four

> months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a *medical discharge* in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage." (R. 503)

Therefore, it is quite clear from the above mentioned exhibits, and petitioner's testimony, that when he was examined by respondent's medical examiner on July 24, 1951, petitioner *knew* that he had served approximately six months in the Army and had received a medical discharge; and knew exactly why he had received this medical discharge. He also knew that he had suffered for many years with disabling rheumatism, and a disabling personal injury. It is inconceivable that petitioner did not know, and have in mind, all of the foregoing facts when he applied to respondent for employment on July 24, 1951.

(c) Petitioner Fraudulently Concealed From Respondent His Past Military Service and Medical Discharge; That He Had Been Seriously Disabled With a Spondylolisthesis, Rheumatism, and a Personal Injury; That He Had Twice Been Convicted of Maiming; That He Had Previously Been Employed By Numerous Coal Companies, and Had Quit Working For One of Said Companies by Reason of a Physical Disability.

On July 24, 1951, petitioner, *without assistance* (R. 371-2, 224-6) filled out and signed an application for employment as a yard brakeman. Defendant's Exhibit No. 4 (R. 225, 480). According to this Application, petitioner had been through grade school, and two years of high school. He had attended vocational

school for training as an automobile mechanic for a period of twenty months (R. 200-1). Petitioner neither asked for, nor received any assistance whatever in filling out this Application (R. 371-2).

Question 10 of said Application reads in part as follows:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of only one employer—the last one by whom he had been employed (R. 226-7). However, petitioner admitted that he had previously been employed by five other concerns (R. 142, 202, 216, 217-18, 219, 220), and by respondent in 1943 and in 1948.

Question No. 10, with reference to petitioner's *previous* employment, and *prior* service with respondent, was perfectly clear and easily understood. There is no contention that petitioner could not read and understand the English language. Question 10 required petitioner to "Give record of all previous employment in date order". It did not ask for the name of petitioner's *last* employer, and petitioner did not so understand the question.

This is shown conclusively by petitioner's answer to an identical question in petitioner's Application for Employment with respondent dated September 27, 1948—Defendant's Exhibit No. 6 (R. 251, 487).

Question 9 in the 1948 Application reads in part as follows:

> "9. Give record of all previous employment in date order * * *".

In his answer to this question, petitioner gave the names of *two* former employers. This shows conclusively that petitioner, in answering question 10 in the 1951 Application, did *not* understand that the answer referred to his *last* employment.

Furthermore, in the 1948 Application, petitioner deliberately concealed the fact that he had been employed by numerous other coal companies, one of which was Pocahontas Fuel Company. Petitioner had ceased working for Pocahontas Fuel Company on account of a "physical disability". Defendant's Exhibit No. 19 (R. 312, 503). Question 10 in the 1951 Application (R. 481) required petitioner to state "Reason for Leaving" previous employment. It is rather obvious why petitioner failed to mention his employment with Pocahontas Fuel Company, and the reason for leaving such employment.

The Application signed by petitioner—Defendant's Exhibit No. 4 (R. 225, 480)—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, *or given a medical discharge.*"

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged."

Having filled in, unassisted, all of the answers to the questions contained in the Application, petitioner necessarily *read* the words "or given a medical discharge". Petitioner did not testify that he did not read and understand the words "or given a medical discharge", and he did not testify that he did not understand what

a "medical discharge" was. To the contrary, petitioner *knew*, as has been shown, that he had received a medical discharge from the Army (R. 141-2, 211-13, 207-10, 229-30). As to this there is not the slightest doubt.

Petitioner knew, of course, that if he had informed respondent he had received a medical discharge from the Army, that his application for employment would not have been approved. Therefore, petitioner told a *half* truth and answered "U. S. Army; Honorable Discharged".

The fact that petitioner, in his 1951 Application for Employment, willfully and intentionally concealed his medical discharge, is strongly corroborated by the fact that petitioner in his 1948 Application for Employment with respondent, also deliberately concealed his prior military service (R. 252-3). Also see Defendant's Exhibit No. 6 (R. 251, 486-7), Question 9 and answer.

The only reasonable conclusion that can be drawn from petitioner's conduct and his testimony is that he willfully and intentionally concealed his prior military service for the purpose of deceiving respondent and securing employment.

Question 14 of petitioner's 1951 Application for Employment with respondent—Defendant's Exhibit No. 4 (R. 225, 480)—and the answer thereto, reads as follows:

> **"14. Have you ever been injured? If so, when and at what place. No."**

This answer was false.

Petitioner was admittedly injured in 1941, and he testified repeatedly that this injury was the cause of

his discharge from the Army in January, 1946 (R. 141-2, 207-9, 211-12, 253).

Question 18 of the 1951 Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—and the answer thereto, read as follows:

> "18. Have you ever been convicted of a crime?: No. * * *".

This answer was false. Petitioner admitted (R. 244-5) that upon the advice of his lawyer, that he had twice pleaded guilty to "maiming".

It is significant that the answers appearing in the 1951 Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—are substantially the same as the answers appearing in the Physical Examination card prepared by respondent's examining physician—Defendant's Exhibit No. 5 (R. 249, 483). For instance, question 11 in the 1951 Application, and the answer thereto, are as follows:

> "Give military service and state whether honorably or dishonorably discharged, or given a medical discharge: U. S. Army; honorable discharged." (R. 481)

In the Physical Examination card the question and answer read as follows: (R. 484)

> "Have you ever had:
> A medical discharge from the military service? No. (Honorable) (R. 484).

Isn't it apparent that both of these answers came from petitioner?

Question 14 in the 1951 Application for Employment, and the answer thereto, read as follows:

> "Have you ever been injured? If so, when and at what place: No." (R. 481-2)

In the Physical Examination card prepared by respondent's medical examiner, the question and answer pertaining to personal injury, are as follows:

> "What injuries have you ever received? No." (R. 484)

There can be no doubt that petitioner falsely answered this question in his Application, as it appears without the slightest conflict that he filled out the Application himself, without any assistance whatever. Having falsely answered the question in his Application, it is only natural that he would have given Dr. Troup the same false answer.

In his answer to question 10 in the 1951 Application for Employment (R. 481), petitioner concealed his former employment by respondent. He likewise concealed such former employment from respondent's medical examiner.

"If Former Employe, where employed? No Previous Employment" (R. 484).

Therefore, it appears that the material answers appearing in the Physical Examination card prepared by respondent's medical examiner, are substantially the same answers appearing in the 1951 Application for Employment which was filled out by petitioner.

(d) If Respondents' Medical Examiner Had Known the Truth Concerning Petitioner's Military Service and Medical Discharge; and His Severe Spondylolisthesis, Rheumatism, and Personal Injury, He Would Not Have Approved Petitioner for Employment in 1951.

It would be preposterous to assume that respondent's medical examiner would have approved petitioner for employment by respondent as a yard brakeman in 1951, or that petitioner would have been so employed, if petitioner had truthfully answered the questions in his Application for Employment, and had made truthful answers to the medical examiner. The medical examiner testified that after he examined petitioner, he believed petitioner was in physical condition to properly discharge the duties of a yard brakeman (R. 416). He further testified that if, when he examined petitioner in July, 1951, petitioner had told him the truth concerning his spondylolisthesis, his previous accident, his illnesses and disabilities, and his Army service and medical discharge, that he would not have approved petitioner for employment as a yard brakeman (R. 413-16), and that petitioner would not have been so employed (R. 421-2). The medical examiner's testimony that he would not have approved petitioner for employment is uncontradicted.

Numerous other doctors testified that if petitioner had spondylolisthesis in 1945 and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a spondylolisthesis is easily aggravated and can become completely disabling. (R. 65, 238-41, 320-1).

(e) Respondent Was Justified In Relying On Petitioner's Representations. It Exercised Reasonable Care In Examining Petitioner.

Petitioner repeatedly asserts in his brief that respondent, in employing petitioner, did not rely on the representations made by petitioner in his 1951 Application for Employment, and his statements to respondent's medical examiner. Petitioner contends that he was dismissed from service in October, 1956, and "rehired" in November, 1957, and that he was not given a physical examination when he was "rehired". As the record shows, petitioner was not "rehired" but "reinstated" and on reinstatement given only vision, hearing and color perception tests (R. 419-21, 424, 474). There was no other examination.

After petitioner was reinstated to his former job, his seniority dated from July 24, 1951 (R. 436-8).

Petitioner contends the fact that respondent physically examined petitioner, indicated that it did not rely on the false answers contained in the Application for Employment, or to respondent's medical examiner. It might just as well be argued that when a life insurance company physically examines an applicant for insurance, that it thereby indicates that it will not rely upon the answers contained in the written application for insurance.

In some cases life insurance companies will issue policies without a physical examination. However, we have never heard of any life insurance company issuing a policy of insurance without a written application. The written application is important to an insurance company, just as it is to an employer, and it is most illogical to contend that a physical examination, by an insurance company, or an employer, indicates that no

reliance is to be placed on the answers contained in the application. Both are important and serve a very useful purpose. Certainly petitioner's false representations made in his Application for Employment and to respondent's medical examiner, cannot be brushed aside by reason of the fact that petitioner was physically examined.

On page 29 of petitioner's brief, footnote 14, reference is made to "Article 17(c) of Rates of Pay and Regulations, Norfolk & Western Ry. Co." requiring that applications for employment must be accepted or rejected within thirty days. As stated in the footnote, this provision of the agreement between respondent and the Brotherhood of Railroad Trainmen was not introduced in evidence. This being true, we wonder why the provision was referred to by petitioner. Certainly the Court will not consider, or be influenced by, matters not in evidence.

The Brotherhood of Railroad Trainmen has likewise attempted to inject into the case the above mentioned provision, and has asked leave to file a brief *amicus curiae* for the purpose of discussing the provision in question. Respondent has objected to the filing of this brief.

We will not discuss the alleged regulation requiring applications for employment to be accepted or rejected within thirty days, as this provision is not in evidence and we assume that it will not be considered by the Court.

As heretofore shown, petitioner filled out, *unassisted*, and signed, his Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—and presented it to respondent's medical examiner. The Application

stated, among other things, that petitioner had attended high school for two years; that he had been honorably discharged from the Army; that he had worked for a coal company as a mine brakeman from November, 1948, to July, 1951; that he had never been injured; that his health was good; that he had never been convicted of a crime.

Nothing in the application indicated petitioner was not physically fit and would not make a good employee. Having been honorably discharged from the Army, it necessarily followed that petitioner had passed a physical examination before going into the Army, and of course respondent's examining physician knew this. The fact that petitioner had been employed by the coal company as a mine brakeman for three years was in itself a rather good recommendation.

There was nothing whatever on the Application to indicate that petitioner was not physically fit, or to excite the medical examiner's suspicions.

During his physical examination in 1951, petitioner gave the medical examiner essentially the same information appearing in the Application. See Defendant's Exhibit No. 5 (R. 249, 483). In the Physical Examination card, it appears that petitioner expressly denied having received a *medical discharge* from the Army. Nothing occurred during the Physical Examination, or in the answers given by petitioner to the medical examiner, indicating that petitioner was not physically fit, unless, as petitioner contends, the medical examiner should have discovered petitioner's spondylolisthesis.

The fact that petitioner had necessarily been examined before going into the Army, and had an honorable discharge from the Army, but not a medical discharge,

and had worked for a coal company for three years as a mine brakeman, would in and of itself indicate that petitioner was physically fit. Add to this the fact that petitioner had never been injured, had never been convicted of a crime, had never suffered from a long or serious illness, or any of the other diseases or disabilities referred to on the Physical Examination card—Defendant's Exhibit No. 5 (R. 249, 483)—and we have a picture of a physically fit person and a desirable employee.

However, petitioner contends that the medical examiner was negligent in not discovering petitioner's spondylolisthesis. We submit that the evidence does not justify this charge.

In view of the fact that an Army doctor, six coal company doctors, two other medical examiners for respondent, and an orthopedic surgeon for petitioner, failed to discover petitioner's spondylolisthesis, it is understandable why respondent's medical examiner in 1951 failed to discover this condition, particularly in view of petitioner's misrepresentations.

Under these circumstances we submit that respondent's medical examiner was not required to make an independent investigation to determine whether petitioner was telling the truth. He was justified in relying upon petitioner's representations, and it is clear beyond doubt that he exercised reasonable care and prudence in examining, and approving petitioner for employment, and that was all that was required of him.

(f) There Was a Direct Causal Connection Between Petitioner's False Representations and His Alleged Injuries.

The evidence is clear that when petitioner was employed by respondent on July 24, 1951, he had a severe second-degree spondylolisthesis, and that he had received a medical discharge from the Army for this condition, and a pension for approximately two years.

We quote from Defendant's Exhibit No. 18 (R. 311, 500, 501):

> "RADIOLOGIC RECORD
>
> The 5th lumbar vertebrae is noted farther anterior than its normal position by a distance equivalent to 1/2 of the anterior posterior diameter of the body of the vertebra indicative of spondylolisthesis."

A neurological surgeon, who was head of the Department of Neurosurgery at the University of Virginia Hospital, Charlottesville, Virginia, testified (R. 235, 239, 240, 243) that the condition shown in the above mentioned x-ray report was essentially the same condition that petitioner had at the time of the trial. There is no evidence to the contrary.

Therefore, it is apparent that the only injury which petitioner could have sustained in the alleged accident, was an aggravation of his pre-existing spondylolisthesis. For many reasons heretofore pointed out, it is questionable whether petitioner sustained any injury. The train which coupled to the car on which petitioner was riding was traveling at a speed of from three to four miles per hour—the usual and customary speed in switching operations of that kind. The car on which petitioner was riding was gradually overtaken and coupled to by the train. When the train stopped, peti-

tioner climbed down off of the car, unassisted, and shortly thereafter complained of his hip and leg to some of his fellow employees. The following day petitioner was examined by a physician, and he did not then complain of his back (R. 428-9, 432). Therefore, if petitioner was actually injured, the injury must have been slight indeed, and would not have produced any disability, but for the pre-existing spondylolisthesis.

It is, therefore, clear that there was a direct causal connection between petitioner's false representations and his alleged injury. This conclusion is borne out by the testimony of an orthopedic physician testifying for petitioner (R. 65).

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic *one even in the ordinary activities of braking, not with any accident at all.*"

We submit that the trial court was clearly right when he said (R. 472) "I can't imagine a stronger case of direct causal connection between the misrepresentations and the injuries complained of than we have in this particular case."

2. THE TRIAL COURT PROPERLY PERMITTED RESPONDENT TO FILE ITS SPECIAL PLEA NO. 1. AND ITS AMENDED SPECIAL PLEA NO. 1.

Petitioner objected to the filing of respondent's Special Plea No. 1, and its Amended Special Plea No. 1, on the ground that respondent had previously stipulated that at the time of petitioner's alleged injury, petitioner was respondent's employee, and engaged in

interstate commerce (R. 40-50, 462-5). The Stipulation referred to appears on pages 18 and 19 of the Record. No law or rule of court required said Special Pleas to be filed prior to the trial date. The Court recognized the fact that counsel for respondent entered into the stipulation in question for the purpose of relieving petitioner from proving that petitioner was engaged in interstate commerce, and expressly held that respondent should not be precluded from filing said Special Pleas, by reason of said stipulation. (R. 464)

We submit that the stipulation in question did not have the effect of precluding the defense of fraud asserted in this case. However, if the stipulation did have such effect, then the Court had the right to relieve respondent from such stipulation, in view of the fact that it clearly appeared that respondent did not intend, by such stipulation, to waive the defense of fraud, and petitioner was not prejudiced in any way by the Court's action. *Brast* v. *Winding Gulf Colliery Company*, 94 F.2d 179 (4th Cir. 1938), *Cole* v. *State Compensation Commissioner*, 173 S.E. 263 (W.Va. 1934).

3. THE TRIAL COURT CORRECTLY INTERPRETED THE LAW IN DIRECTING A VERDICT FOR RESPONDENT

The trial court in directing a verdict in favor of respondent, relied principally upon the case of *Minneapolis, St. Paul & S.S.M. Ry. Co.* v. *Rock*, 279 U.S. 410. We submit that the *Rock* case is clearly in point and supports the judgment of the trial court.

The court, in the course of its opinion in the *Rock* case, said:

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their

railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.

* * *

"Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and *physical condition* to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy."

The facts in the *Rock* case, and in the case now under consideration are different, but the principle involved in both cases is exactly the same.

In the *Rock* case the plaintiff perpetrated a fraud on the railway company by having another person impersonate him and in his place to submit to the required examination. In the case now under consideration, petitioner himself submitted to the examination, but in his Application for Employment, and in reply to questions by respondent's medical examiner, he made false answers with reference to his Army service, medical discharge, physical condition, illnesses and accidents. These fraudulent representations deceived respondent and enabled petitioner to secure employment with respondent.

The only difference between the *Rock* case and the case now under consideration is the *type of fraud* perpetrated. In both cases the employees obtained their employment by fraud.

In fact, the case now under consideration is even stronger in favor of the employer than the *Rock* case, in view of the fact that in the *Rock* case there was no connection whatever between the employee's fraudulent conduct and the *accident*, or the employee's *injuries*, whereas in the case now under consideration, there was a direct causal connection between petitioner's fraudulent conduct and his alleged injuries.

The Rock case was followed by *Minneapolis, St. P. & S.S.M. R. Co.* v. *Borum*, 286 U.S. 447. In the *Borum* case, which cited the *Rock* case with approval, the defendant railroad company denied liability for Borum's injury for the reason that Borum misrepresented his age when applying for employment with the defendant.

The evidence disclosed that it was a general practice of men, over the age specified in the rule, when applying for work on the railroads of defendant and other carriers in the Northwest, falsely to represent their ages to be within the specified limit, and that this practice was known to the defendant.

The facts in the Borum case are not at all similar to the facts in the case now under consideration. However, the most important distinction between the Borum case and this case is that in the Borum case there was no causal connection whatever between Borum's false representation with respect to his age, and his injury, whereas in the case now under consideration there was a direct causal connection between petitioner's false representations and his alleged injury.

In the case of *Casso* v. *Pennsylvania Railroad Company*, 219 F.2d 303 (3rd Cir., 1955), the Court held, Syl. 2:

> "One who has procured his employment by fraud may not recover (under Federal Employers' Liability Act) providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Southern Pacific Co.* v. *Libbey*, 199 F.2d 341 (9th Cir. 1952), the Court said, page 348:

> "it is not questioned by either side that one who procures his employment by fraud is not entitled to the benefits of the Employers' Liability Act * * * providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Ercsafe* v. *New York N. H. & H. R. Co.*, 250 F.2d 619 (2nd Cir., 1957), the Court said, pages 621-622:

> "A humane and realistic policy in such cases requires substantial proof of a direct causal connection between the misrepresentations made at the time of hiring and the subsequent *injury* to the employee, before any defense of fraud can be considered as a bar to a recovery."

In the case of *Talarowski* v. *Pennsylvania R. Co.*, 135 F. Supp. 503 (D.C. Del., 1955), the Court held that an employee is not entitled to maintain an action under the Federal Employers' Liability Act where his employment has been procured by fraudulent statements made in the application for employment, if the statements are relied upon, and are of such a character as to have been a substantial factor in the hiring.

In the case of *Matthews* v. *Atchison T. & S. F. R. Co.*, 129 P. 2d 435 (Cal., 1942), the Court said, page 440:

> "The concealment does not vitiate the contract of employment and prevent recovery, unless there is shown to be a casual connection between the *injury* (not accident) and the misrepresentations in the application for employment."
>
> "Where employee of railroad had obtained employment on misrepresentations, relied on by railroad, employment contract *held* void, precluding recovery for injuries under statute (Federal Employers' Liability Act." Syl. 2)
>
> Fort Worth & D. C. Ry. Co. v. Griffith, 27 S.W. 2d 351 (Tex. 1930).

The case of *White* v. *Thompson*, 312 P. 2d 612 (Kan., 1957), a well considered case, while not in point on

the facts, supports respondent's position that where there is a direct causal connection between the false representations and the injury sustained by the employee, that the employee cannot recover. However, in White v. Thompson it was entirely clear that there was no causal connection between the employee's false representations and his injury.

> "Employee's concealment of vital facts from employer when procuring employment will not vitiate contract of employment and prevent recovery for injuries sustained in such employment *unless there is a causal connection between injury and misstatements.*" Syl. 3.
>
> Phillips v. Southern Pac Co., 58 P.2d 688 (Cal., 1936).

The case of *Clark* v. *Union Pacific*, 211 P. 2d 402 (Idaho, 1949), also supports respondent's position, although in that case the Court held that the question whether the railroad company was deceived by the employee's misrepresentations, was for the jury. In that case the employee testified that he gave to the defendant's medical examiner full information with reference to his physical condition. Petitioner did not so testify.

In *Blanton* v. *Northern Pacific Co.*, 10 N.W. 2d 382 (Minn. 1943), and *Laughter* v. *Powell*, 14 S.E. 2d 826 (N.C., 1941), it was quite clear that there was no causal connection between the alleged false representations and the injuries sustained by the plaintiffs.

In *Payne* v. *Daugherty*, 283 F. 353 (8th Cir., 1922), strongly relied on by petitioner, it does not clearly appear that there was a causal connection between the alleged false representations and the injury sustained

by the plaintiff, and the decision could well be justified on that ground.

Petitioner's brief, page 42, takes the position that before respondent can avoid liability for petitioner's alleged injuries, on the ground of false representations, that it must be shown that there was a direct causal connection between the false representations and the alleged *accident*. We do not so understand the law. Certainly none of the above mentioned cases so hold. It would be most illogical to hold that respondent could not defend on the ground of such false representations, without showing a direct causal connection between the false representations and the *accident*, when it clearly appears that there was a direct causal connection between such false representations and the *injuries* alleged to have been sustained.

Petitioner takes the further position on page 42 of his brief, that even though petitioner did make false representations, and there was a direct causal connection between such false representations and petitioner's alleged injury, that nevertheless petitioner became an employee and is entitled to recover under the F.E.L.A. However, this contention is completely refuted by the cases above cited.

In determining whether this case should have been submitted to the jury, the test seems to be whether the jury could "with reason" have found the issues in favor of petitioner. *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500.

> "Where the evidence is so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

Gunning v. Cooley, 281 U.S. 90.

> "As to the second category, although the statements concerning directed verdicts are often extremely ambiguous, a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, points so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion."

Moore's Federal Practice, Volume 5, page 2314.

We respectfully submit that the facts herein, and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of respondent, that reasonable men could not possibly come to a contrary conclusion and that, therefore, the judgment of the trial court should be affirmed.

Respectfully submitted,

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